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No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MICHAEL HIRSH,

Petitioner,

v.

CITY OF ATLANTA,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of Georgia

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does an injunction that forbids the distribution of literature on public ways and sidewalks, absent the prior, express oral consent of each recipient, violate the right to free speech under the First and Fourteenth Amendments?

2. Does an injunction that forbids conversation with, or the display of a sign to, any other person, within five feet of that person, absent the prior, express oral consent of that other person, violate the right to free speech under the First and Fourteenth Amendments?

3. Does an injunction that compels objectionable speech by requiring a person affirmatively to "instruct" others "not to engage in or participate in any of the activities enjoined" violate the right to free speech under the First and Fourteenth Amendments?

4. Is an injunction that forbids otherwise lawful expressive activity in public places an unconstitutional prior restraint?

5. Does an injunction that forbids otherwise lawful expressive activity and applies only to opponents of abortion violate the rights to free speech and equal protection of the laws under the First and Fourteenth Amendments?

6. Are the terms of the challenged injunction unconstitutionally vague or overbroad?

PARTIES

The appellants in the Supreme Court of Georgia were Michael Hirsh (the petitioner here) and Mitchell Williams. Mr. Williams is not a party to the present petition. The appellee in the Supreme Court of Georgia was the City of Atlanta (the respondent here).

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PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

This is the second time the present litigation has come before this Court. At issue is a state-court injunction that, *inter alia*, imposes restrictions on free speech in public places in the City of Atlanta and compels objectionable speech. Petitioner Hirsh previously applied to this Court for a stay, pending his appeal to the Supreme Court of Georgia, of these injunctive restrictions on free speech. The Court denied that application, by a 5-4 vote, over the dissent of Justices Kennedy, Brennan, Marshall, and Scalia. *Hirsh v. City of Atlanta*, 110 S. Ct. 2163 (1990). The state supreme court subsequently upheld, with one modification, the contested injunction.

As sustained by the court below, the challenged portions of the injunction: 1) effectively ban the distribution of literature along public ways and sidewalks within fifty feet of any abortion facility (or parking lot used by staff or clientele) in the City of Atlanta; 2) forbid conversation with or display of a sign to another person, within a five-foot "speech-free bubble zone" surrounding that person, absent the express oral consent of that person; 3) place a 20-person limit on the number of demonstrators, picketers, and protesters within fifty feet of any abortion facility in the city; 4) restrict the content of messages on signs by banning the display of signs that "shall induce" passersby to honk their horns; and 5) compel involuntary, objectionable speech by affirmatively requiring petitioner Hirsh and others to instruct all "members" of Operation Rescue and all those who work with them not to engage in activities forbidden under the injunction.

Petitioner Hirsh now seeks review, on the merits, of these portions of the injunction.

DECISIONS BELOW

The decision of the Supreme Court of Georgia is reported as *Hirsh v. City of Atlanta*, 401 S.E.2d 530 (Ga.

1991). The opinion and orders of the Superior Court of Fulton County, Georgia, are unreported.

JURISDICTION

The judgment of the Supreme Court of Georgia in this case was entered on March 15, 1991. This Court has jurisdiction, under 28 U.S.C. § 1257(a), to review the judgment of the state supreme court.

CONSTITUTIONAL PROVISIONS

The first amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

The first section of the fourteenth amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

The respondent—plaintiff in the trial court—is the City of Atlanta, Georgia. Located within the boundaries of the city are at least five facilities at which abortions take place. Tr. 39.[1] Defendants in the trial court were

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[1] The abbreviation "Tr." refers to the transcript of the trial in the Superior Court of Fulton County on March 22, 1990.

various opponents of human abortion: Operation Rescue (an unincorporated association), several named individuals (including petitioner Michael Hirsh), and unnamed individual defendants designated as "John Doe(s) and Jane Doe(s)."

The City of Atlanta adopted a resolution in September of 1988 authorizing the city attorney to seek an injunction against Operation Rescue, Hirsh, and other named and unnamed individuals. Tr. 321-24 (Plaintiff's Ex. 42). The resolution authorized the city attorney to seek an injunction against specific unlawful activities—namely, trespassing, obstruction, physical abuse or threats, and excessively loud noise at abortion facilities—and the direction of others to engage in such conduct. Tr. 323-24. The resolution explicitly provided that "nothing in the order of the Court shall be intended or sought to limit the exercise of any legitimate First Amendment Rights under the U.S. Constitution." Tr. 324.

Pursuant to this resolution, the city attorney filed the present action. After various preliminary proceedings, the matter came on for trial on March 22, 1990, in the Superior Court of Fulton County, Georgia.

Evidence at trial showed that individuals opposed to abortion have engaged in two distinct types of public activity: lawful expressive activity, on the one hand; and trespass or obstruction, on the other. *Compare* Tr. 38, 52 (testimony of Atlanta police officer Lt. Carl Pyrdum) (describing blockades and trespasses) *with* Tr. 58 (Lt. Pyrdum) ("there were individuals engaged in lawful First Amendment conduct, picketing"). As counsel for respondent explained, Tr. 25,

> . . . persons who are opposed to abortion . . . have done two things. The named defendants here and many, many others not named have engaged in two different kinds of conduct. One is protected by the First Amendment. That is, picketing, peaceful picketing, leafleting, sidewalk counseling and the like. The other thing they have done, which is not lawful, is

> on many, many occasions they have joined together to . . . bar access or ingress or egress to or from abortion clinics or medical facilities . . . at which abortions are performed.

Counsel for respondent specifically disavowed any desire to restrict First Amendment activities. "We have never, from day one, made any complaint about leafleting or picketing in a peaceful manner by anybody. It's irrelevant to the relief we are seeking." Tr. 133. As respondent's attorney emphasized in his closing arguments, Tr. 160-61,

> . . . I want to make clear that we have no interest in trying to prevent peaceful picketing, leafleting, pamphleting, education and all of those First Amendment activities, and the city council put in his [sic] resolution they do not enjoin First Amendment protective [sic] activities. They do enjoin what constitutes a public nuisance.

Petitioner Hirsh specifically opposed the creation of injunctive restrictions upon the legitimate exercise of free speech. Tr. 163-66.

At the close of trial, the superior court announced that it would issue an order restraining the defendants. Tr. 171.

On March 28, 1990, the superior court entered its findings of fact and conclusions of law. App. 14a. The court simultaneously issued an injunctive order. App. 24a. The following day the court entered an Amended Order, which replaced the prior injunction. App. 29a.

The amended order contained an injunction in ten separate paragraphs. Among the various injunctive provisions were prohibitions against trespass, obstruction, tortious harassment, and excessive noise. App. 30a. The injunction also imposed restrictions upon otherwise lawful expressive activities. These sections of the injunction provided in pertinent part as follows:

> IT IS HEREBY ORDERED: . . . that Defendants herein and any and all persons acting in concert or

participation with them, including but not limited to agents, directors, or representatives of Defendants, be and they hereby are restrained and enjoined from particular conduct as follows:

. . .

5. No first person seeking to pass a leaflet or handbill to or display a sign to or engage in oral protest, education, or counseling with a second person, in the public way or sidewalk area within a radius of fifty feet from any property line of any facility at which abortions are performed in the City of Atlanta or within a radius of fifty feet of any parking lot used by patients, employees, medical practitioners and invitees of such facilities, shall approach closer than five feet from such second person, unless such second person gives express oral consent to do so. Immediately upon request of such second person, no such first person shall fail to withdraw to at least five feet from such second person, or, in the alternative, to discontinue all efforts at passing such leaflet or handbill or displaying such sign or engaging in such protest, education or counseling. Without limitation, such imperative statements as "stop", "withdraw", "back off", "get away", "leave me alone", shall be sufficient to constitute such a request. This prohibition shall also apply whenever any such second person is moving to such parking lots from such facilities, or to such facilities from such parking lots.

. . .

7. Unless otherwise prohibited by this order, Demonstrating, Picketing and Protesting shall be permitted in the vicinity of any such facility at which abortions are performed in the City of Atlanta only as follows: the number of participants shall not exceed 20 per abortion facility; the participants shall remain far enough apart from each other and from any other person so as not to block or impede ingress or egress to such facility, parking lot or driveway used by patients, their families and friends, employees, medical practitioners or invitees of said facilities, or to violate any of the provisions of this order. Further that no sign may be used to block or

> impede ingress or egress to such facility parking lot or driveway and no sign shall induce a passer-by to honk or blow their horn.
>
> . . .
>
> 10. The Defendant Operation Rescue and its officers and agents and representatives and the individual named defendants and those working in concert with them are directed and ordered to instruct all members of any such organization and all those working with them not to engage in or participate in any of the activities enjoined in this order.
>
> . . .

App. 30a-32a.[2]

On April 6, 1990, petitioner Hirsh filed a notice of appeal to the Supreme Court of Georgia. That same day, Hirsh filed in superior court a motion immediately to stay, pending appeal, those portions of the injunction (set forth above) that imposed restrictions upon speech and expressive activities.

When the superior court took no action on Hirsh's motion for an immediate stay, Hirsh filed a motion for supersedeas in the Supreme Court of Georgia requesting a stay of the injunction, in relevant part, pending appeal.

On April 25, 1990, the Supreme Court of Georgia denied Hirsh's request for a stay. The next day Hirsh filed an application for a stay with Justice Kennedy as Circuit Justice for the Eleventh Circuit. Justice Kennedy referred the application to the full Supreme Court, and on May 14, 1990, this Court, over the dissent of Justices Kennedy, Brennan, Marshall, and Scalia, denied the stay request. *Hirsh v. City of Atlanta*, 110 S. Ct. 2163 (1990) (App. 35a).

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[2] Paragraph Three of the injunction provided as follows:

> 3. No person shall conduct demonstrations pickets or protests within 50 feet of any property line of any facility within the City of Atlanta at which abortions are performed.

App. 30a. The Supreme Court of Georgia effectively modified the injunction on appeal so as to eliminate this paragraph. *See infra* note 4.

In his appeal on the merits before the Supreme Court of Georgia, Hirsh challenged the speech-restrictive portions of the injunction as violative of his rights to free speech and equal protection under the First and Fourteenth Amendments.[3] Hirsh attacked the specific injunctive provisions as unconstitutionally restrictive of protected free speech activities, as unconstitutionally vague and overbroad, and as unconstitutionally discriminatory because applicable only to opponents of abortion. Hirsh argued that injunctive restrictions on lawful free speech were prior restraints and therefore presumptively unconstitutional. Hirsh also challenged the creation of new substantive restrictions on lawful expressive activity as contrary to the rule of *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), that a court may restrain "only unlawful conduct," not protected speech, *id.* at 924 n.67.

The Supreme Court of Georgia upheld the injunction in its entirety, with one modification.[4] *Hirsh v. City of Atlanta*, 401 S.E.2d 530 (Ga. 1991) (App. 1a). The court held that the challenged provisions were constitutional time, place, and manner restrictions, *id.* at 533-34 (App. 5a-8a). The court rejected Hirsh's argument that the restrictions imposed unreasonable and unconstitutional limitations on free speech. *Id.* The court also de-

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[3] Petitioner Hirsh also challenged these provisions of the injunction on state-law grounds. The Supreme Court of Georgia rejected these arguments, and they are not before this Court.

[4] Paragraph Three of the injunction by its terms imposed an absolute ban on all "demonstrations pickets or protests" within fifty feet of the property line of any abortion business. App. 30a. The Supreme Court of Georgia, however, construed the injunction to allow up to twenty demonstrators, picketers, or protesters within fifty feet of the property line of any abortion business. *Id.* at 533 (App. 6a-7a). The court essentially subordinated the provisions of Paragraph Three to the less restrictive provisions of Paragraph Seven of the injunction. *Id.* ("In order to meet the requirement that the restrictions be narrowly tailored, the ban in Paragraph 3 . . . must be read in conjunction with Paragraph 7 . . ."). In effect, the court deleted Paragraph Three entirely, and modified Paragraph Seven by replacing the phrase "in the vicinity" with "within 50 feet of any property line".

clined to apply the doctrine of prior restraints, *id.* at 533 n.3 (App. 5a), and specifically rejected Hirsh's claim of unconstitutional discrimination, *id.* at 533 (App. 6a). The court further rejected Hirsh's argument that requiring Hirsh and other defendants to "instruct" people not to engage in enjoined activities was equivalent to "forcing [defendants] to violate their consciences, religious beliefs, or moral or political philosophies . . . ." *Id.* at 534 (App. 8a). The court did not discuss Hirsh's vagueness and overbreadth arguments.

Two members of the state supreme court dissented. Writing for the dissenters, Justice Fletcher declared that the challenged injunction was "overbroad" because it "curtails non-consensual, peaceful activities traditionally associated with protests, and, as a result, runs afoul of the First Amendment." *Id.* at 534 (App. 11a). Justice Fletcher observed in particular that the creation (in Paragraph 5) of the five-foot speech-free zones around passersby "infringes on virtually all non-consensual contact with the public." *Id.* (App. 12a).

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE SUPREME COURT OF GEORGIA IS IN CONFLICT WITH THE DECISIONS OF OTHER STATE COURTS AND FEDERAL COURTS OF APPEALS.

The state and federal courts are sharply divided on the question whether an injunction may issue to restrain lawful free speech activity in public places. The decision of the Supreme Court of Georgia, approving of such injunctive restrictions, is in direct conflict with decisions of federal appeals courts for the District of Columbia, Second, Fourth, and Fifth Circuits, the state supreme court in Massachusetts, and state appellate courts in New York. Courts approving, on the other hand, of injunctive restrictions on otherwise lawful expressive activities include the federal appeals courts for the Third and Ninth Circuits, and the highest courts of the states of Ohio and Washington.

Before this Court are essentially two questions: First, may a court, in the absence of any existing legal restrictions on the activity in question, create—by means of an injunction—new substantive restrictions on public expressive activity?[5] Second, even if a court may create new substantive restrictions on free speech by means of an injunction, are the restrictions at issue in the present case constitutional?

The Supreme Court of Georgia answered "yes" to both of these questions. In so doing, the court rendered a decision that conflicts with the decisions of various federal courts of appeals and state courts, as outlined below.

A. The Decision Below Conflicts with Decisions of the Federal Courts of Appeals.

The decision of the Supreme Court of Georgia, upholding an injunction against otherwise lawful expressive activity in public places, conflicts with decisions of the federal courts of appeals for the District of Columbia, Second, Fourth, and Fifth Circuits.

In *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788 (5th Cir. 1989), the Fifth Circuit, in the context of anti-abortion activities, refused to approve an injunction "to prevent the protestors from approaching within 500 feet of the clinic and . . . forbidding the use of such terms as 'kill,' 'murder,' and 'butcher.'" *Id.* at 790. Judge Gee, in his lead opinion,[6] declared that "[b]ecause no local ordinance attempts to limit the public expressions of the protestors," *id.* at 791, the court of appeals could not take upon itself the regulatory authority "to choose between those who believe in, and may wish to exercise, the right to have an abortion and those who

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[5] Petitioner does not challenge the constitutionality of an injunction against conduct that is already forbidden under existing law.

[6] Judge Rubin, concurring in a separate opinion, agreed that the plaintiff abortion business had failed to show that the threatened "harm" to it outweighed the "injury to the First Amendment rights of the protestors." *Id.* at 797 (footnote omitted). The third member of the panel dissented. *Id.*

believe that other rights are involved and wish to make this opinion known peaceably," *id.* at 791-92. Judge Gee observed that "peaceful picketing" and "sidewalk counseling" are "generally protected under the First Amendment." *Id.* at 792 n.3. Emphasizing the absence of any ordinance restricting these activities, *id.* at 794 ("no evidence of any local law restricting the expression of the protestors") (footnote omitted), 795 (the Supreme Court "has upheld some *local ordinances* that restrain freedom of speech") (emphasis in original), 796 (Supreme Court has been reluctant to construe regulations in a manner that would restrict speech "even when there has been a government ordinance—as there is not here"), Judge Gee wrote that the judicial creation of such a substantive regulation would exceed "the scope of our authority," *id.* at 795. "Neither we nor the clinic can cut off the peaceful communication of information, distasteful to some though it be." *Id.* at 796.

In the present case, by contrast, the Supreme Court of Georgia upheld an injunction restricting expressive activities—including picketing and sidewalk counseling—not so restricted by any local ordinance.

The District of Columbia Circuit, in *White House Vigil v. Clark*, 746 F.2d 1518 (D.C. Cir. 1984), strongly disavowed the notion that courts have the power to create time, place, and manner restrictions on expressive activity. "Courts possess no particular expertise in the drafting of regulatory measures; their role is to uphold regulations which are constitutional and to strike down those which are not." *Id.* at 1529 (footnote omitted). Drawing guidance from this Court's decisions clarifying "the respective institutional roles of administrators and judges," *id.* at 1531, the court declared that the "expertise of courts lies in determining whether an agency's decision is within the zone of constitutionality, not in choosing between options within that zone," *id.* at 1531 (footnote omitted). "While the temptation to engage in judicial rulemaking may be powerful, our Constitution is best

preserved by adherence to the proper judicial role." *Id.* at 1541.[7]

In the present case, by contrast, the Supreme Court of Georgia upheld the injunctive creation of substantive regulations of public expressive activity.

The Second Circuit, in *New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990), carefully distinguished between lawful and unlawful expressive activities in upholding an injunction against certain anti-abortion conduct. Declaring lawfulness to mark the boundary between defendants' "rights of free speech" and the rights of passersby to freedom from tortious or criminal conduct, *id.* at 1343, the court sustained an injunction that forbade only trespass, obstruction, physical abuse, and tortious harassment, *id.* at 1354 n.1. The injunction contained an explicit "safe harbor" provision for sidewalk counseling and a protective disclaimer stating that "nothing in this Order shall be construed to limit Operation Rescue participants' exercise of their legitimate First Amendment rights." *Id.* The Second Circuit placed heavy emphasis upon the inapplicability of the injunction to protected speech, *id.* at 1363, recognizing that "defendants are entitled to express their views on [abortion], particularly when standing on a public sidewalk where, since time immemorial, the authority to regulate speech is sharply restricted," *id.* (citation omitted).[8]

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[7] Although *White House Vigil* involved review of regulations, not an injunction, the rule of decision announced by the court is plainly incompatible with any judicial legislation in the form of an injunction defining new substantive offenses.

[8] Two district courts in the Second Circuit have similarly heeded the distinction between unlawful and otherwise lawful expressive conduct. In *Cousins v. Terry*, 721 F. Supp. 426 (N.D.N.Y. 1989), the court granted an injunction against anti-abortion "rescues" while providing a First Amendment disclaimer and a "safe harbor" clause for sidewalk counseling. *Id.* at 432. The court specifically noted that "rallies, picketing, sidewalk counseling, and leafletting . . . could be described as normal First Amendment activity." *Id.* at 430. And in *Town of West Hartford v. Operation Rescue*, 726

In the present case, by contrast, the Supreme Court of Georgia disregarded the distinction between lawful and unlawful expressive activity and upheld injunctive restrictions on picketing, leafletting, and even mere conversation on public sidewalks.

The Fourth Circuit, in *National Organization for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990) (per curiam), *cert. granted on other grounds sub nom. Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991), affirmed the refusal to grant injunctive restrictions that would merely "*risk* enjoining activities clearly protected by the First Amendment," 914 F.2d at 586 (emphasis added). The court noted that opponents of abortion "sought, through verbal means, to persuade women not to seek the services of abortion clinics and to 'impress upon members of society' the moral rightness and intensity of their opposition to abortion." *Id.* (citation omitted). The court affirmed the "refusal to broaden the scope of the injunction to include activities that tend to 'intimidate, harass or disturb patients or potential patients' " because these injunctive restrictions "would interfere with such expressive activity," *id.* The district court had explicitly declared that "injunctive relief must not abridge defendants' First Amendment rights to express their abortion views in an appropriate manner in the vicinity of abortion clinics." *National Organization for Women v. Operation Rescue*, 726 F. Supp. 1483, 1497 (E.D. Va. 1989).

In the present case, by contrast, the Supreme Court of Georgia upheld an injunction that does not merely "risk" interfering with protected speech, but directly imposes substantial restrictions on picketing, literature distribution, and even mere conversation on public sidewalks.

F. Supp. 371 (D. Conn. 1989), *vacated on other grounds*, 915 F.2d 92 (2d Cir. 1990), the district court issued an injunction only against "conduct out of the protection of the first amendment altogether," 726 F. Supp. at 383. The court specifically observed that "[a]ttempts to persuade others are within the core of the first amendment's protection," as are "picketing, leafleting, and demonstrating," *id.* (citations omitted).

Compounding the conflict between the decision below and the cited decisions in the District of Columbia, Second, Fourth, and Fifth Circuits, are decisions in the Third and Ninth Circuits upholding, contrary to the preceding federal decisions, the injunctive creation of substantive restrictions on expressive activity in public places. The Ninth Circuit, in *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 859 F.2d 681 (9th Cir. 1988), sustained the injunctive creation of a "speech-free zone" directly in front of an abortion business. This zone encompassed a section of the sidewalk extending from the door to the curb and twelve-and-a-half feet to each side. *Id.* at 684. In this rectangular "speech-free zone," opponents of abortion could neither demonstrate nor distribute literature. *Id.* The Third Circuit, in *United States v. Gedraitis*, 690 F.2d 351 (3d Cir. 1982), *cert. denied*, 460 U.S. 1071 (1983), upheld an injunction that, with certain exceptions, banned "picketing, protesting, rallying, demonstrating or similarly assembling," 690 F.2d at 356, in an area covering over twenty city blocks, *see United States v. Pyle*, 518 F. Supp. 139, 159-60 (E.D. Pa. 1981) (text of same injunction, with constitutional analysis); *id.* at 163 (map of area).

B. The Decision Below Conflicts with Decisions of Other State Courts.

The decision of the Supreme Court of Georgia is also in conflict with decisions of the Supreme Judicial Court of Massachusetts and the Appellate Division of the Supreme Court of New York.

In *Planned Parenthood League of Massachusetts, Inc. v. Operation Rescue*, 406 Mass. 701, 550 N.E.2d 1361 (1990), the highest court of the state of Massachusetts held that, "When issuing an injunction, a judge *must differentiate between legal and illegal expressive activity*, and must carefully tailor the injunction to avoid unconstitutionally infringing on activity protected by the First Amendment." *Id.* at 713, 550 N.E.2d at 1369 (emphasis

added) (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-15 (1982)). The court approved of an injunction, in the context of abortion protests, that forbade trespass, obstruction, and acts of violence, *see Planned Parenthood League*, 406 Mass. at 705 n.5, 550 N.E.2d at 1364 n.5 (text of injunction), because the "injunction prohibits *only* that conduct which, although expressive, is *not protected* by the First Amendment," *id.* at 716, 550 N.E.2d at 1370 (emphasis added). The court specifically observed that "some of the defendants' activities at the protests, such as singing and chanting on public sidewalks, are protected, expressive activity." *Id.* at 713-14, 550 N.E.2d at 1369. Noting that the "injunction does *no more* than enjoin the defendants from engaging in *illegal* activity," the court emphasized that the "injunction *does not prohibit other types of expressive activity*, such as praying, singing, or peaceful picketing," *id.* at 715, 550 N.E.2d at 1370 (emphases added).

In the present case, by contrast, the Supreme Court of Georgia sustained an injunction that imposed substantive restrictions on previously lawful picketing, literature distribution, and even conversation on public sidewalks.

In *O.B.G.Y.N. Association v. Birthright of Brooklyn and Queens, Inc.*, 64 A.D.2d 894, 407 N.Y.S.2d 903 (1978), the Appellate Division of the Supreme Court of New York modified an injunction that restricted anti-abortion activities outside of an abortion business. The court declared that "the restraint imposed should be *limited to defendants' activities that are not protected* under the First and Fourteenth Amendments to the United States Constitution." *Id.* at 894, 407 N.Y.S.2d at 905 (emphasis added). The court modified the injunction at issue to delete restrictions on peaceful picketing, conversation, literature distribution, and the content of messages on placards. *Id.* at 895-96, 407 N.Y.S.2d at 905-07.

In the preesnt case, by contrast, the Supreme Court of Georgia upheld restrictions on peaceful picketing, conversation, literature distribution, and the content of messages on placards.

In a subsequent case involving anti-abortion activities, the appellate division of New York reached a similar result. The court held that a ban on "demonstrating, picketing and in any way interfering with the normal operation of the abortion clinic" was "overly broad and unnecessarily restricted peaceful picketing and demonstrating in a quasi-public area." *Parkmed Co. v. Pro-Life Counselling, Inc.*, 91 A.D.2d 551, 552, 457 N.Y.S.2d 27, 29 (1982). The court held that there must be "a distinction drawn between that conduct [restrained] and lawful, peaceful demonstration so that the affected party is given a clear choice." *Id.* The court sustained the remainder of the injunction—forbidding blocking, physical abuse, and disruption—because it "does not prevent [defendants] from picketing or demonstrating peaceably in the plaza area, from handing out pamphlets, from carrying placards, or from quietly attempting to persuade. Nor does it regulate the content of their speech." *Id.* at 553, 457 N.Y.S.2d at 29.

In the present case, by contrast, the Supreme Court of Georgia upheld substantial injunctive restrictions on picketing, leafleting, displaying placards, and even quietly attempting to persuade. The court also sustained an injunctive restriction on the content of messages on signs.

The decision of the state supreme court below is therefore in conflict with the decisions of courts in other states.[9]

Compounding this conflict are decisions from the highest courts of Ohio and Washington upholding, contrary to *Planned Parenthood League of Massachusetts*, *O.B.G.Y.N.*, and *Parkmed*, the imposition of injunctive restraints upon

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[9] *See also Chico Feminist Women's Health Center v. Scully*, 208 Cal. App. 3d 230, 256 Cal. Rptr. 194 (1989). In *Scully*, the California court of appeal refused to enjoin "all picketing activity on Saturdays" outside an abortion business. *Id.* at 239, 256 Cal. Rptr. at 198. Observing that picketing is a form of free speech under the first amendment, *id.* at 243, 256 Cal. Rptr. at 201, the court held that there was a "constitutional directive to fashion the narrowest possible restraint on speech," *id.* at 248, 256 Cal. Rptr. at 204.

otherwise lawful expressive activity in public places. *See Planned Parenthood Ass'n of Cincinnati, Inc. v. Project Jericho*, 52 Ohio St. 3d 56, 556 N.E.2d 157 (upholding injunction limiting the number and placement of picketers outside an abortion business), *reh'g denied*, 53 Ohio St. 3d 706, 558 N.E.2d 61 (1990); *Bering v. SHARE*, 106 Wash. 2d 212, 721 P.2d 918 (1986) (upholding injunction prohibiting picketing, demonstrating, and sidewalk counseling along street and sidewalk in front of abortion business; upholding injunction prohibiting oral use of the words "murder" or "kill" in the presence of children outside of abortion business), *cert. dismissed*, 479 U.S. 1050 (1987).

In summary, the District of Columbia, Second, Fourth, and Fifth Circuits, like the Supreme Judicial Court of Massachusetts and the Appellate Division of the Supreme Court of New York, hold that courts may not, consistent with the first amendment, impose injunctive restrictions upon otherwise lawful expressive activity in public places. The Third and Ninth Circuits, like the supreme courts of Ohio and Washington and the Supreme Court of Georgia in the case at bar, disagree and hold that courts may impose injunctive restrictions upon otherwise lawful expressive activity in public places.

II. THE DECISION OF THE SUPREME COURT OF GEORGIA IS IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

The decision of the Supreme Court of Georgia in the case at bar conflicts with the governing decisions of this Court in at least five respects. By upholding an injunction against both lawful and unlawful expressive activity, the court below disregarded the constitutional requirement to tailor judicial relief only to legally unprotected conduct. By upholding an injunction against free speech in public places, the court below disregarded the doctrine of prior restraints. By upholding an injunction that restricts only anti-abortion speech, the court below disregarded the constitutional rule against content- and viewpoint-based discrimination in public places. By effectively

forbidding the distribution of literature and severely burdening the display of placards and even mere conversation on public ways and sidewalks, the court below disregarded the constitutional protection afforded to peaceful expression in public places. Finally, by forcing petitioner Hirsh to engage in speech repugnant to his beliefs, the court disregarded the constitutional prohibition against compulsory speech.

A. An Injunction Against Lawful First Amendment Activity Conflicts with the Decision of this Court in *NAACP v. Claiborne Hardware Co.*

In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), this Court held that in the context of protected expressive activities, courts may "restrain *only unlawful conduct* and the persons responsible for conduct of that character." *Id.* at 924 n.67 (emphasis added). The Supreme Court of Georgia, by sustaining an injunction that includes prohibitions against lawful expressive activities, rendered a decision in conflict with *Claiborne Hardware.*

In *Claiborne Hardware*, this Court reviewed a state court order imposing damages and an injunction against numerous civil rights activists. This Court reversed, pointing out that the activists' behavior included both "elements of criminality and elements of majesty." *Id.* at 888. Justice Stevens, writing for the Court, emphasized the need to separate out lawful and unlawful activities before imposing remedial sanctions:

> No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence. When such conduct occurs in the context of constitutionally protected activity, however, 'precision of regulation' is demanded. . . . Specifically, *the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damage liability and on the persons who may be held accountable for those damages.*

Id. at 916-17 (emphasis added and citation omitted). The "importance of avoiding the imposition of punishment for

constitutionally protected activity," *id.* at 934, required this Court to reverse the sweeping imposition of damages liability.

"For the same reasons," this Court continued, "the permanent injunction" imposed against the activists "must be dissolved." *Id.* at 924 n.67. The Court declared that the lower court, on remand, "may wish to vacate the entire injunction" if the facts indicated that the order was "no longer necessary;" at a minimum, however, "the injunction *must* be modified to restrain *only unlawful conduct* and the persons responsible for conduct of that character," *id.* (emphasis added).

In the case at bar, the respondent City of Atlanta itself admitted and proved the pervasive presence of protected free speech. As one city police officer testified, "there were individuals engaged in lawful First Amendment conduct, picketing" (Tr. 58). Counsel for the city summarized the evidence as follows:

> [P]ersons who are opposed to abortion . . . have done two things. The named defendants here and many, many others not named have engaged in two different kinds of conduct. *One is protected by the First Amendment. That is, picketing, peaceful leafleting, sidewalk counseling and the like.* The other thing they have done, which is not lawful, is on many, many occasions they have joined together to . . . bar access or ingress or egress to or from abortion clinics or medical facilities . . . at which abortions are performed.

Tr. 25 (emphasis added).

Respondent's counsel conceded that the city had "no interest in trying to prevent peaceful picketing, leafleting, pamphleting, education and all of those First Amendment activities," Tr. 160-61. The superior court nevertheless issued an injunction restraining these expressive activities. By sustaining this injunction, the Supreme Court of Georgia disregarded the constitutional rule applied in *Claiborne Hardware.*

B. An Injunction that Imposes Restrictions on Otherwise Lawful Expressive Activity in Public Places Conflicts with the Doctrine of Prior Restraints.

The Supreme Court of Georgia upheld the speech-restrictive portions of the injunction at issue as reasonable time, place, and manner regulations. 401 S.E.2d at 533-34 (App. 5a-8a). In so doing, the court pursued a course in clear conflict with the decisions of this Court applying the doctrine of prior restraints.

This Court has never approved of the use of injunctions as a vehicle for substantive legislation, i.e., for defining new offenses. On the contrary, this Court has treated injunctions which impose substantive restrictions on free speech as presumptively unconstitutional prior restraints.[10] Nor has this Court ever applied time, place and manner analysis to injunctions that impose substantive restrictions on expressive activity. Rather, the Court has applied this test only to statutes, ordinances, and regulations.[11]

There are several reasons, reflected in the decisions of this Court, for disfavoring the use of substantive injunctions against free speech. These considerations principally reflect the wisdom of preserving the distinction between the lawmaking role of elected bodies and the adjudicative role of courts.

First, a statute or ordinance applies uniformly, while an injunction imposes special legal restrictions only upon

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[10] *E.g., National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977) (per curiam) (injunction against marches and rallies); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam) (injunction against publication of classified government documents); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (injunction against distribution of literature); *Carroll v. President of Princess Anne*, 393 U.S. 175 (1968) (court order restraining public rallies and meetings).

[11] *E.g., Grayned v. City of Rockford*, 408 U.S. 104 (1972) (statute); *Frisby v. Schultz*, 487 U.S. 474 (1988) (ordinance); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (regulations).

a particular group of people. The injunctive creation of substantive offenses therefore inherently results in unequal legal treatment.[12] *See infra* § II(C). In the present instance, for example, protesters against CIA activities or the sale of nonunion grapes are free to assemble as many participants as they can (subject, of course, to general laws ensuring public order and unobstructed passage). Anti-abortion protesters, however, must limit their rallies, marches, and pickets to only twenty participants. Animal rights activists may carry signs that say "Honk if you love puppies," but pro-life picketers are forbidden to carry signs that say "Honk if you love babies." Such content-based restrictions on expressive activities in publice places constitute "censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments.." *Carey v. Brown*, 447 U.S. 455, 463 n.7 (1980) (citation and quotation marks omitted).

Second, those alleged to have violated an ordinance retain the full panoply of due process rights and substantive defenses. Those alleged to have violated an injunction, by contrast, face summary contempt proceedings with virtually no opportunity to challenge the underlying restrictions or raise any defense other than denial of the alleged acts. *E.g.*, *Walker v. Birmingham*, 388 U.S. 307 (1967). Legislation by injunction, therefore, is akin to the imposition of martial law. Such a means of governance is repugnant to our system of republican democracy.

Third, the task of a court is to *weigh* a law, not to *draft* one. When a judge issues a substantive injunction, he effectively removes one level of judicial review. Just as a former legislator appointed to the bench ought not to hear a case challenging a law he himself authored, so a judge ought not to be in the position of judging an injunction he himself crafted. Courts refuse to rewrite

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[12] If the enjoined acts are already unlawful, the injunction does not define a new offense, but merely adds extra penalties. In such a case the order is remedial or procedural, not legislative or substantive.

unconstitutional laws; nor should a court write the law in the first place in the form of a substantive injunction. *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 299 (1984) ("We do not believe . . . that . . . the time, place, or manner decisions assign to the judiciary the authority to replace [government officials] as the manager of [public forum property—here, parks]"); *Gregory v. Chicago*, 394 U.S. 111, 118 (1969) (Black, J., concurring) ("It is not our duty and indeed not within our power to set out and define with precision just what statutes can be lawfully enacted to deal with situations like the one confronted here by police and protestors").

Fourth, judicial creation of new substantive laws, by means of an injunction, bypasses and denigrates the legislative function of elected, representative bodies. City councils and state legislatures have the task of enacting laws defining offenses and regulating conduct. If a city council declines to enact a "bubble zone" requirement or a twenty-person limit on marches or protests, a court should not preempt this representative decision by passing the same restriction in injunctive form. Such misuse of the judiciary overburdens the courts and encourages elected officials to evade responsibility by referring citizen complaints to the courts. *Cf. New York Times Co. v. United States*, 403 U.S. 713, 742 (1971) (Marshall, J., concurring) (Constitution does not provide for "government by injunction" in which courts may "make law"); *id.* at 731 (White, J., concurring) (prior restraint not justified, "at least in the absence of express and appropriately limited [legislative] authorization").

The doctrine of prior restraints establishes a constitutional barrier to such abuse of the judiciary and resultant jeopardy to free speech rights. But by evaluating the injunction at issue under the time, place, and manner standard applicable to legislation, the court below ignored the strict constitutional safeguards designed to shield free speech from unconstitutional prior restraints.

This Court "has emphasized that a system of prior restraints of expression comes to this Court bearing a heavy

presumption against its constitutional validity." *Carroll v. President of Princess Anne*, 393 U.S. 175, 181 (1968) (internal quotation marks, brackets, and citations omitted). *See also FW/PBS, Inc. v. City of Dallas*, 110 S. Ct. 596 (1990).

> An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of public order. . . . In other words, the order must be tailored as precisely as possible to the exact needs of the case.

Carroll, 393 U.S. at 183-84.

In past decisions, this Court has consistently regarded an injunction that restricts expressive activity in public places as a prior restraint. *See supra* note 10 (citing cases). The Supreme Court of Georgia ignored these precedents in the case at bar.

C. An Injunction that Restricts Otherwise Lawful Expressive Activity in Public Places Only for Members of a Particular Movement Conflicts with the Decisions of this Court Overturning Content- or Viewpoint-Based Restrictions on Speech.

The injunctive restrictions on picketing, distribution of literature, and conversation at abortion facilities in the present case apply to "Defendants herein and any and all persons acting in concert or participation with them" (App. 29a). Such a ban necessarily applies only to *anti-abortion* activities. The Supreme Court of Georgia nevertheless held that the restrictions at issue were "content neutral." 401 S.E.2d at 533 (App. 6a).

In *Carey v. Brown*, 447 U.S. 455 (1980), and *Police Department v. Mosley*, 408 U.S. 92 (1972), this Court struck down laws that prohibited picketing in public places but exempted certain labor picketing. These laws unconstitutionally "discriminate[d] between lawful and unlawful conduct based upon the content of the demonstrator's communication." *Carey*, 447 U.S. at 460 (foot-

note omitted). A restriction based upon the speaker's point of view is even more patently unconstitutional. *See Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 806, 812 (1985) (viewpoint discrimination is unconstitutional even in a nonpublic forum).

In the present case, the injunctive restrictions on expressive activity on streets and sidewalks outside of abortion facilities apply only to anti-abortion speech. These restrictions would not apply to labor protests, civil rights marches, demonstrations against acid rain, and so forth, because these other demonstrations would not be actions taken "in concert or participation with" the anti-abortion defendants in this case. Even demonstrations in *favor* of abortion would be exempt from the injunction at issue. The injunction, therefore, is both content- and viewpoint-discriminatory [13] and thus unconstitutional insofar as it restricts otherwise lawful speech in public places.

> [U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. . . . Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

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[13] The alternative interpretations of the applicability of this injunction are also unconstitutional. For example, if the injunction really did apply "irrespective of the subject matter to be communicated," 401 S.E.2d at 533 (App. 6a), this could mean one of two things: either, 1) the injunction applies to protesters wholly unconnected with the opponents of abortion, in which case the injunction clearly violates both free speech and due process; or, 2) the injunction applies only to those persons who *espouse anti-abortion beliefs* or are *motivated by a desire to stop abortion*, in which case the injunction infringes directly upon freedom of thought and association.

Mosley, 408 U.S. at 96. By excluding only those who speak *against* abortion, the City of Atlanta has "grant[ed] to one side of a debatable public question . . . a monopoly in expressing its views." *United States v. Kokinda*, 110 S. Ct. 3115, 3125 (1990) (plurality) (internal quotation marks and citation omitted). In upholding this injunction, the Supreme Court of Georgia has rendered a decision in conflict with the precedents of this Court.

D. An Injunction that Effectively Prohibits Conversation, Distribution of Literature, and Picketing on Public Sidewalks Conflicts with Numerous Free Speech Decisions of this Court.

Paragraph Five of the injunction creates a speech-free "bubble zone" extending five feet out from any person. No one

> seeking to pass a leaflet or handbill to or display a sign to or engage in oral protest, education, or counseling with a second person, in the public way or sidewalk area within a radius of fifty feet from any property line of any facility at which abortions are performed . . . or . . . any parking lot used by patients, employees, medical practitioners, and invitees of such facilities, shall approach closer than five feet from such second person, unless such second person gives express oral consent to do so. Immediately upon request of such second person, no such first person shall fail to withdraw to at least five feet from such second person, or, in the alternative, to discontinue all efforts at passing such leaflet or handbill or displaying such sign or engaging in such protest, education or counseling.

App. 30a-31a. The decision of the Supreme Court of Georgia upholding this provision is in direct conflict with numerous decisions of this Court recognizing first amendment protection for peaceful expressive activity in public places.

The distribution of leaflets on public ways is, of course, a form of free speech protected under the first amend-

ment. *United States v. Grace*, 461 U.S. 171 (1983); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Lovell v. Griffin*, 303 U.S. 444 (1938). Pure verbal expression in public places, whether for purposes of protest, education, counseling, proselytization, or solicitation, is also protected under the first amendment. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *Cantwell v. Connecticut*, 310 U.S. 296 (1940). The display of a sign also is a form of protected free speech. *Grace*; *Thornhill v. Alabama*, 310 U.S. 88 (1940).

Furthermore, public streets and sidewalks are traditional "public forum" property for purposes of the first amendment. *Boos v. Barry*, 485 U.S. 312, 318 (1988); *Grace*, 461 U.S. at 177. "In such places, which occupy a special position in terms of First Amendment protection, . . . the government's ability to restrict expressive activity is very limited." *Boos*, 485 U.S. at 318 (internal quotation marks and citation omitted). "Regulation of speech activity on governmental property that has been traditionally open to the public for expressive activity, such as public streets and parks, is examined under strict scrutiny." *United States v. Kokinda*, 110 S. Ct. 3115, 3119 (1990) (plurality).

The "bubble zone" provision of Paragraph Five of the injunction at issue here directly burdens traditional free speech activities in a public forum. Under this provision, a pamphleteer cannot simply hand out leaflets in silence to passersby. Instead, the pamphleteer *must ask, and receive, "express oral consent," in advance,* in order to approach close enough to hand out a flier. The sidewalk counselor who wants to offer information on alternatives to abortion must likewise *stand back, call out for, and receive, in advance, "express oral consent"* to approach to a point where a semi-private conversation may be held. A picketer must *put away his placard or turn it so that the message faces away* from bystanders or passersby whenever coming within five feet of any such person, absent *"express oral consent," in advance,* to display the

message. The "bubble zone" provision thus imposes a major and unprecedented impediment to traditional free speech in public places.

In effect, the "bubble zone" provision converts virtually every form of public communication, at least initially, into a verbal solicitation—namely, a request for the consent of the audience. The detrimental impact on free speech is obvious:

> As residents of metropolitan areas know from daily experience, confrontation by a person asking for [something] disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information. One need not ponder the contents of a leaflet or pamphlet in order mechanically to take it out of someone's hand, but one must listen, comprehend, decide and act in order to respond to a solicitation.

United States v. Kokinda, 110 S. Ct. at 3123 (plurality).

This "common-sense" observation, *id.*, holds true especially in the context of counseling and education outside an abortion center. A woman may readily accept a leaflet, scan the message on a placard, or listen silently to the sidewalk counselor's words. After all, she can always discard the leaflet or ignore the message. But she is far less likely to go so far as to invite a stranger to approach her. This would be unusual under normal circumstances; for a prospective abortion patient, such an explicit invitation is especially unlikely because "express oral consent" might appear to convey a message of ambivalence regarding abortion. The woman may be very reluctant to reveal her ambivalence in the presence of an adamant boyfriend or escort who wants her to go ahead with the abortion.

In short, given the practical reality of the situation, the combination of distance and permission requirements of Paragraph Five imposes a virtually total ban on literature distribution, poses substantial obstacles to all oral communication, and seriously burdens the free display of signs and placards in public places, in conflict with the past decisions of this Court.

The "bubble zone" provision is also unconstitutionally vague and overbroad.

Virtually every form of speech can be characterized as either "protest, education, or counseling." Indeed, the only possible exception might be speech that is so vapid, uncontroversial, and devoid of content as to be bland drivel or platitudinous small talk. The injunction, in short, applies to "the universe of expressive activity," and thus "purports to create a virtual 'First Amendment Free Zone,'" *Board of Airport Com'rs v. Jews for Jesus*, 482 U.S. 569, 579 (1987), around any person in the vicinity of a facility in which abortions take place. This provision is therefore unconstitutionally overbroad. *Id.* at 573-76.

On the other hand, if "oral protest, education, or counseling" does *not* include all speech, then the scope of this provision is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). What is "protest"? What is "education"? What is "counseling"?[14] Obviously, there can be an almost endless variety of interpretations of these terms. This Court has repeatedly held, however, that under the Constitution, "we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly," *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The creation of "bubble zones" within fifty feet of any abortion business or parking lot "may trap the innocent by not providing fair warning." *Id.* (footnote omitted). Moreover, because the injunction "abuts upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of those freedoms." *Id.* at 109 (internal quotation marks, brackets, and foot-

[14] For that matter, what is a "facility . . . at which abortions are performed"? Does this mean only abortion businesses? What about hospitals? Physicians' offices? Furthermore, how is someone supposed to know whether a given parking lot is "used by patients, employees, medical practitioners and invitees of such facilities"?

notes omitted). "Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Id.* (internal quotation marks and footnote omitted). Thus, Paragraph Five of the injunction is "void for vagueness" because its "prohibitions are not clearly defined." *Id.* at 108.

In sum, the decision of the Supreme Court of Georgia upholding this "bubble-zone" injunction clearly conflicts with numerous decisions of this Court affording constitutional protection to peaceful expressive activity in public places.

E. An Injunction that Requires a Person to Engage in Objectionable Speech Conflicts with the Decisions of this Court Forbidding Compulsory Speech.

Paragraph Ten of the injunction requires petitioner Hirsh and other defendants "to instruct all members of any such organization [Operation Rescue] and all those working with them not to engage in or participate in any of the activities enjoined in this order." This provision conflicts with the decisions of this Court disallowing the compulsion of personally repugnant speech and forbidding vague restrictions on speech.

Paragraph Ten is not a mere prohibition of incitement to immediate unlawful action. Paragraph Eight of the injunction already forbids anyone to "solicit, induce or direct any other person to violate the provisions of this Order," App. 32a, and petitioner Hirsh does not challenge this provision. Paragraph Ten, however, goes much farther and affirmatively *compels* speech, thus running afoul of the first amendment.

Petitioner Hirsh believes that abortion is murder. Tr. 141. Pursuant to that belief, Hirsh has encouraged others to oppose abortion through the exercise of their right to free speech, e.g., by picketing and distributing literature. Tr. 140.

To require Hirsh affirmatively to "instruct" others *not* to take peaceful steps to stop abortion is to require him to speak in betrayal of his principles. The first amend-

ment, as repeatedly interpreted by this Court, forbids such compulsory speech. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (overturning requirement that unwilling students salute the American flag); *Wooley v. Maynard*, 430 U.S. 705 (1977) (overturning requirement that automobile license plates bear the state motto, "Live Free or Die").[15]

This is not a case of merely *forbidding* petitioner Hirsh from advocating or inciting certain unlawful conduct. Rather, the present injunction *orders* Hirsh *affirmatively and involuntarily to condemn* certain actions. "Here, as in *Barnette*, we are faced with a [government] measure which forces an individual . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable," *Wooley*, 430 U.S. at 715. The decision of the Supreme Court of Georgia forces Hirsh to become, through his speech, an unwilling law enforcement tool of the City of Atlanta.

This compulsory speech provision is also unconstitutionally vague. The injunction does not clearly specify to whom petitioner Hirsh must speak. Hirsh must instruct "all members of any such organization." The phrase "any such organization" refers only to Operation Rescue. *See* 401 S.E.2d at 534 (App. 8a) (provision in question "requires the . . . defendants . . . to instruct all members of the Operation Rescue organization"). But the superior court did not find that Operation Rescue has any "members." Does the term "members" refer only to leaders and staff? Even participants (who cannot be known in advance)? All those on the mailing list of Operation Rescue?

The injunction requires Hirsh and others to instruct, in addition, "all those working with them." Does this

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[15] *See also Torcaso v. Watkins*, 367 U.S. 488 (1961) (state may not require religious oath as condition of public employment); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (state may not force newspaper to publish replies to criticism); *Abood v. Detroit Board of Educ.*, 431 U.S. 209 (1977) (state may not require public employees to contribute to ideological causes).

mean current staff or volunteers? Project or event participants? Anyone who helps in any way with fundraising, planning, or education? The court below spoke of "colleagues and followers." *Id.* But in so doing, the court merely substituted one vague phrase for another.

If the order *forbade* certain speech, Hirsh could avoid potential liability for contempt by refraining altogether from making the prohibited communications—to anyone. The compulsory speech provision, however, imposes an *affirmative obligation* upon Hirsh *to speak.* Hirsh—like all individuals subject to the injunction—is *automatically in contempt unless he takes affirmative steps to escape liability*, namely, by engaging in certain speech. The mandatory nature of this injunctive provision absolutely requires specificity in drafting. That specificity is absent here.

To forbid a specific activity is one thing. To impose an affirmative obligation with uncertain contours, however, is to go beyond the legitimate bounds of injunctive relief, in conflict with the decisions of this Court.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari to review the judgment of the Supreme Court of Georgia in the case at bar.

Respectfully submitted,

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June 12, 1991

APPENDICES

APPENDICES

APPENDIX A

IN THE SUPREME COURT OF GEORGIA

S90A1327

HIRSH

v.

CITY OF ATLANTA

S90A1494

WILLIAMS

v.

CITY OF ATLANTA

Decided: Mar. 15, 1991

BENHAM, Justice.

The City of Atlanta, having declared the actions of certain protestors to be a public nuisance, sought and was granted an injunction against Operation Rescue, several named individuals, and Jane and John Doe, described as others acting in concert with any of the named defendants in the complained of conduct. Contending that aspects of the injunction violate their First Amendment right of free speech, appellant Hirsh, a named defendant, and appellant Williams, who asserted he was a "John Doe," appeal from the entry of certain portions of the injunction.[1]

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[1] Appellants take issue with the following portions of the 13-paragraph injunction:

At the hearing on the injunction, the city presented evidence that appellant Hirsh and another named defendant informed the Atlanta city police in July 1985 of their intention to blockade a different facility providing

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3. No person shall conduct demonstrations, pickets or protests within 50 feet of any property line of any facility within the City of Atlanta at which abortions are performed.

5. No first person seeking to pass a leaflet or handbill to or display a sign to or engage in oral protest, education, or counseling with a second person, in the public way or sidewalk area within a radius of 50 feet from any property line of any facility at which abortions are performed in the City of Atlanta or within a radius of fifty feet of any parking lot used by patients, employees, medical practioners and invitees of such facilities, shall approach closer than five feet from such second person, unless such second person gives oral consent to do so. Immediately upon request of such second person, no such first person shall fail to withdraw to at least five feet from such second person, or, in the alternative, to discontinue all efforts at passing such leaflet or handbill or displaying such sign or engaging in such protest, education or counseling. Without limitation, such imperative statements as "stop," "withdraw," "back off," "get away," "leave me alone," shall be sufficient to constitute such a request. This prohibition shall also apply whenever any such second person is moving to such parking lots from such facilities, or to such facilities from such parking lots.

7. Unless otherwise prohibited by this order, demonstrating, picketing, and protesting shall be permitted in the vicinity of any facility at which abortions are performed in the City of Atlanta only as follows: the number of participants shall not exceed 20 per abortion facility; the participants shall remain far enough apart from each other and from any other person so as not to block or impede ingress or egress to such facility, parking lot or driveway used by patients, their facilies and friends, employees, medical practitioners, or invitees of said facilities, or to violate any of the provisions of this order. Further that no sign may be used to block or impede ingress or egress to such facility parking lot or driveway and no sign shall induce a passer-by to honk or blow their horn.

10. That defendant Operation Rescue and its officers, agents, and representatives, and the individual named defendants and those working in concert with them are directed and ordered to instruct all members of any such organization and all those working with them not to engage in or participate in any of the activities enjoined in this order.

abortions within the city limits each day of the Democratic National Convention. Neither the police nor the targeted facility was ever given prior notice of the site or time of the defendants' actions. From July 19 - September 22, 1988, police encountered the defendants and their followers 22 times at five different locations. The defendants' primary method of operation was to assemble a large group of people at a designated location in the early morning hours and transport the massed group to a certain facility within the city. Upon arrival at their destination, the group trespassed on private property to blockade the means of ingress to and egress from the targeted building by locking arms and sitting and lying down. Emergency entrances, as well as entrances to the clinics and the administrative areas, were blockaded, trapping persons within the building as well as denying access to those physicians, staff, and clients who wished to enter. The protestors refused to leave when ordered to do so by authorized agents of the property owner and by police. When denied access to the private property, the group blocked the public right of way. When police barricades were in place, protestors crawled under the barricades separating them from the targeted facility. When placed under arrest, the group members refused to accompany police voluntarily and went limp, thereby forcing police officers to carry or drag them to police vehicles. Until the protestors were removed by arresting officers, the targeted facility was, in effect, shut down. The executive director of one health center testified that her facility had been the target of Operation Rescue activity over 100 times during the 20-month period from July 1988 to the date of the hearing, March 22, 1990.

Upon the arrival of an automobile at a targeted facility, protestors surrounded the car, making it difficult for anyone to exit the vehicle. Upon emerging from a car, a patient was swarmed, became the target of verbal epithets, was photographed by the protestors, and was

forced to go through the crushing crowd of protestors in order to enter the facility. On at least one occasion, a patient had to be lifted bodily by police over the protestors in order to gain access to the blockaded facility. A clinic executive director testified that the protestors' activities caused patients much anxiety, that those who did gain access were visibly upset and some emotionally distraught. Patients' blood pressure and pulse rates were elevated by the impediments they had to overcome to gain entry, subjecting the women to additional health risk should an abortion, performed under local anesthesia, be done while the patient was in such a shaken state. Thus, additional time had to elapse in order for a patient to calm down sufficiently to permit medical care to begin. However, the sounds of the protestors could be heard in the clinic's waiting, counseling, procedure, and recovery rooms, disrupting physicians and staff in all aspects of medical care-giving, as well as being a further impediment to a patient's relaxed state.

The director of the city's detention facilities testified that arrests had been made at protests the two days immediately preceding the hearing, bringing the total number of such arrests to approximately 1320. The sheer number of persons arrested had forced the city to create temporary jail facilities and to cancel inmate visitation and recreation. Because many protestors refused to give correct names during the booking process, the average length of stay of each protestor in the jail increased to 5.21 days, with a cost to the city of $272,076 to house the incarcerated protestors.

The city introduced into evidence literature published under the name of Operation Rescue urging people to come to Atlanta to join in the protests in July 1988, October 1988, December 1988, and December 1989. There was evidence that an Operation Rescue recorded telephone message encouraged callers to picket a targeted facility, the homes of an attending physician and a prosecut-

ing solicitor, and informed them of rallies at which they would be indoctrinated into the methods to be used during protests at the facilities.

1. The Atlanta city charter empowered the city to define a nuisance and provide for its abatement. 1973 Ga. L., 2188, § 1-102 (b), Appendix I, p. 2252, § (31). In September 1988, the Atlanta City Council passed a resolution, finding that defendants' actions, designed to and having had the effect of endangering the public security, health, safety, and welfare of the City and its citizens, constituted a public nuisance, and authorized the City Attorney to seek injunctive relief against the defendants.[2]

2. Appellants contend that the portions of the injunction which they have singled out (see footnote 1, supra) impermissibly infringe upon their First Amendment right to free speech.[3] Since public streets and sidewalks have historically been considered "public forums,"

> the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions "are content-neutral, are narrowly tailored to serve a significant govern-

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[2] Seeking an injunction to enjoin an existing or threatened public nuisance, even though the nuisance constitutes conduct punishable under the criminal laws, is authorized. *Evans Theatre Corp. v. Slaton*, 227 Ga. 377(3) (180 SE2d 712) (1971).

[3] Is it important to note, as did Justice Stevens when the U.S. Supreme Court denied appellants' application for stay of the injunction pending appeal, that this injunction imposes

> time, place, and manner restrictions upon a class of persons who have persistently and repeatedly engaged in unlawful conduct [in the jurisdiction imposing the injunction. It is not] an injunction that constitutes a naked prior restraint against a proposed march by a group that did not have a similar history of illegal conduct in the jurisdiction where the march was scheduled. [*Hirsh v. City of Atlanta*, 110 SC 2163 (1990)]

ment interest, and leave open ample alternative channels of communication." [Cits.] *United States v. Grace*, 461 U.S. 171, 177 (103 SC 1702, 75 LE2d 736) (1983).

a) "Content neutral" speech regulations are those that "are justified without a reference to the content of the regulated speech." *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (96 SC 1817, 48 LE2d 346) (1976). Inasmuch as the injunction applies irrespective of the subject matter to be communicated and does not single out a particular content of speech for better or worse treatment (see id.), it is content-neutral. See also *N.Y. NOW v. Terry*, 886 F2d 1339, 1363 (2d Cir. 1989); *Portland Fem. Women's H. Ctr. v. Advocates for Life*, 859 F2d 681, 686 (9th Cir. 1988).

b) It cannot be questioned that the city government has a significant interest in maintaining public safety by being able to control traffic on urban streets and sidewalks as well as being able to disperse its law enforcement personnel throughout the city instead of having to assign large numbers of officers to surround potential targets of the defendants' activities; a significant interest in the continued orderly operation of its pretrial detention facility; a significant interest in the right of citizens to obtain desired medical services; and a significant interest in the continued operation of lawful, licensed businesses and medical facilities. The trial court was authorized to conclude that the pre-injunction actions of the defendants endangered all of those significant governmental interests.

c) In order to meet the requirement that the restrictions be narrowly tailored to serve the significant government interests and leave open ample alternative channels of communication, the ban in Paragraph 3 on demonstrations, pickets, or protests within 50 feet of the property

line of a facility providing abortions must be read in conjunction with Paragraph 7 of the injunction, which permits certain demonstrating, picketing, and protesting "in the vicinity of" any facility at which abortions are performed if the number of protestors is limited to 20 and they remain far enough apart from each other so as not to block or impede entry to or exit from the facility, its driveway, and parking lot, and no sign is used to effect such an impediment. Thus, the injunction restricts the defendants' prior behavior by providing a "free zone" in which an overwhelming number of protestors cannot impede the safe provision of medical care by harassing, intimidating, and assaulting facility physicians, staff, and clients. See *Portland Fem. Women's H. Ctr. v. Advocates for Life*, supra, at 686. Yet, at the same time, "ample alternative channels of communication" are left open by permitting 20 demonstrators "in the vincinity of," i.e., withing the 50-foot area. The 20 demonstrators must, of course, abide by the other portions of the injunction regulating noise and behavior.

Paragraph 5 of the injunction is spatially limited to the area within 50 feet of the facility's property line and an area within 50 feet of a parking lot used by facility staff and patients. It is patterned after a Boulder, Colorado ordinance (§ 5-3-10), and reinforces the 50-foot "free zone" established in Paragraph 3 while creating a restriction beyond the 50-foot area if the facility's parking lot is located beyond the 50-foot "free zone." Within the "free zone" and the area surrounding the parking lot, no one on the public streets or sidewalks may distribute a leaflet, display a sign, or engage in oral protest, education, or counseling with another person from within 5 feet of the second person without the consent of the second person. This affords a clinic patient, physician, or employee the ability to exit a vehicle and approach the site of medical care without being swarmed, jostled, and yelled at from close range by protestors. While the pro-

testors have the right to express their message, the 5-foot "bubble zone" is an appropriate and permissible means for the trial court to use in balancing the protestors' freedom of expression with the patient's rights of access to chosen medical care and to privacy. Note, "Too Close for Comfort: Protesting Outside Medical Facilities," 101 Harvard L. Rev. 1856.

3. The final injunctive paragraph with which appellants take exception requires the named defendants and the Jane and John Does to instruct all members of the Operation Rescue organization and all those working with them not to engage in or participate in any of the enjoined activities. Requiring appellants to tell their colleagues and followers not to engage in the enjoined activities is not forcing appellants to violate their consciences, religious beliefs, or moral or political philosophies and condone abortion. Rather, it requires them to make their colleagues and followers aware of the reasonable time, place, and manner restrictions imposed upon their First Amendment rights. It is also a means by which the court can ensure that "those persons in active concert or participation with" the defendants receive notice of the injunction so that they will be bound by it. OCGA § 9-11-65 (d).

4. Appellants contend that the noted paragraphs of the injunction violate the Georgia constitutional guarantee of free speech [4] and that their issuance by the trial court constituted a legislative act, thereby violating the separation of powers doctrine found in the state constitution.[5]

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[4] "No law shall be passed to curtail or restrain the freedom of speech or of the press. Every person may speak, write, and publish sentiments on all subjects but shall be responsible for the abuse of that liberty." 1983 Ga. Const. Art. I, § I, Para. V.

[5] "The legislative, judicial, and executive powers shall forever remain separate and distinct; and no person discharging the duties of one shall at the same time exercise the functions of either of the others except as herein provided." 1983 Ga. Const. Art I, § II, Para. III.

While the state constitutional guarantee of free speech is absolute as to what it protects, it does not protect all speech, for it does not protect that which is "an abuse of that liberty." *K. Gordon Murray Productions v. Floyd*, 217 Ga. 784, 791 (125 SE2d 207) (1962). Furthermore, legislative or judicial action may infringe upon protected expression if

> it further an important government interest; if the government interest is unrelated to the suppression of speech; and if the incidental restriction of speech is no greater than is essential to the furtherance of that interest. [*Harris v. Entertainment Systems*, 259 Ga. 701, 703 (386 SE2d 140) (1989)]

The restrictions imposed by the injunction relate to the time, manner, and place of appellants' exercise of their First Amendment rights. The only content-related restriction (no signs inducing passing motorists to honk their horns are permitted within the 50-foot "free zone") furthers an important government interest, to avoid loud noises or sound which disturbs, injures, or endangers the health and safety of any patient, employee, or physician so as to complicate the medical service being provided. The Georgia constitutional safeguard of free speech is not violated since the incidental restriction on speech is no greater than is essential to the furtherance of the important governmental interest.

The trial court's issuance of the injunction does not amount to a usurpation of the legislative power by a member of the judicial branch. The trial court was authorized to enjoin a public nuisance, and the public nuisance herein involved had constitutionally-protected elements. The trial court did no more than exercise its power to mold a decree so as to meet the exigencies of the case. OCGA § 23-4-31.

> 4. Liberty can only be exercised in a system of law which safeguards order. . . . [O]ur constitutional

command of free speech and assembly is basic and fundamental and encompasses peaceful social protest, so important to the preservation of the freedoms treasured in a democratic society. *Cox v. Louisiana*, 379 U.S. 559, 574 (85 SC 476, 13 LE2d 487) (1965)]

The evidence supports the trial court's decision that the actions of the defendants threatened the safeguard of order in the city of Atlanta. The injunction entered by the trial court permits appellants to exercise their right of free speech by engaging in social protest, limited only by reasonable time, place and manner restrictions. By doing so, the injunction also safeguards the order necessary to preserve the continued exercise of liberty, including appellants' rights of free speech and assembly. We hold, therefore, that since the injunction, as construed herein, is not subject to the constitutional challenge urged by appellants, there is no basis for reversal of the trial court's judgment.

Judgment affirmed. All the Justices concur, except Smith, P.J. and Fletcher, J. who dissent.

FLETCHER, Justice, dissenting.

As the majority and the parties below point out, the conduct of some of the demonstrators was clearly illegal and not protected by the First Amendment; the conduct of others involved only peaceful picketing, conduct which is protected by the First Amendment. The majority opinion details the inadequacies of the criminal justice system in addressing and preventing illegal and unprotected conduct of some demonstrators.[1] In my opinion, the entanglement of illegal and legal conduct in this case has resulted in an injunction that is overbroad.

The trial court has attempted to fashion a civil remedy which will eliminate the criminal conduct of the demonstrators. However, the injunction also curtails nonconsensual, peaceful activities traditionally associated with protests, and, as a result, runs afoul of the First Amendment. The injunction restricts peaceful picketing, leafletting, displaying of signs and verbal communication of beliefs to an area at least fifty feet from the property line of any abortion facility.

It is undisputed that, as a general proposition, "peaceful picketing and leafletting are expressive activities involving 'speech' protected by the First Amendment." *United States v. Grace*, 461 U.S. 171, 176 (103 SC 1702, 75 LE2d 736) (1983). I cannot agree with the majority's conclusion that the injunction is tailored narrowly enough to protect First Amendment interests. The majority points out that

> within the 'free zone' and the area surrounding the parking lot, no one on the public streets or sidewalks may distribute a leaflet, display a sign, or engage in oral protest, education, or counseling with another person from within 5 feet of the second person without the consent of the second person. Op., p. 8

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[1] At what point do the courts decide that due to the failure of the criminal justice system, they will permit infringement on First Amendment rights?

I agree with the majority that this procedure will prevent swarming, jostling and yelling by the protesters. It will also deny the protestors their right to free speech in that that injunction infringes on virtually all nonconsensual contact with the public.

I would also note that the portion of the injunction restricting the protestors to zones 50 feet away from any property line of any facility at which abortions are performed, or any parking lots used by patients, employees, medical practitioners and invitees of such facilities, is not a "regulation of . . . place . . . narrowly tailored to serve a significant government interest." *Perry Ed. Assn. v. Perry Local Ed. Assn.* 460 U.S. 37, 45 (103 SC 948, 74 LE2d 794) (1983). Many streets together with the public sidewalks that abut them lie within rights-of-way that are 50 feet or less in width. With no public property lying within a reasonable distance of the entrances to the facilities on which they are now permitted to protest, does not this injunction deprive peaceful protestors of a public forum in which to exercise their rights of free speech? The overly broad restrictions contained in the injunction have resulted in displacement of the protestors to areas in which no effective exercise of their First Amendment rights can be made.

The geographic restrictions on the demonstrators in this case are far greater than in any of the cases cited by the majority. In *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 859 F2d 681 (CA 9 1988), the demonstrators engaged in much of the same criminal conduct that is present in this case. However, in a narrowly tailored order, the trial court enjoined "obstructing the free and direct passage of any person" into the abortion facility, and demonstrating or distributing literature "in a rectangular zone that extends from the Center's front door to the curb and twelve and one-half feet on either side of a line from the middle of the

Center's door to the curb." *Id.* at 684. In *N.Y. State NOW v. Terry*, 886 F2d 1339, 1345 (CA 2 1989), the trial court only enjoined demonstrators from certain aspects of sidewalk counseling and from "trespassing on, blocking or obstructing ingress into or egress from any facility at which abortions are performed."

Because I would hold that the injunction in the case before us is overbroad, I respectfully dissent to the majority opinion. I am authorized to state that Presiding Justice Smith joins in this dissent.

APPENDIX B

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

Civil Action File No. D-61462

CITY OF ATLANTA, GEORGIA,
Plaintiff,

vs.

OPERATION RESCUE; RANDALL TERRY, GARY LEBER, MICHAEL MCMONAGLE, JOSEPH FOREMAN, MICHAEL HIRSH, JOHN DOE(S) and JANE DOE(S), the last two being fictitious names the real names of said Defendants being presently unknown to Plaintiff, said fictitious names being intended to designate organizations or persons who are members of Operation Rescue and others acting in concert with any of the Defendants who are engaging in or intend to engage in the conduct complained of herein,
Defendants.

ORDER

[Filed Mar. 28, 1990]

This matter having come before the Court for trial on Plaintiff's Complaint for Injunctive Relief on March 22, 1990, and the Court having considered evidence and arguments presented to the Court the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1.

The City of Atlanta is a municipal corporation chartered under the laws of the State of Georgia.

2.

Defendant Operation Rescue is an unincorporated association of organizations and individuals with offices in Marietta, Georgia and elsewhere. Its purposes include organizing and coordinating disruptions of abortions and family planning facilities, including blockades carried out, planned and proposed, within the City of Atlanta.

3.

Defendant Randall Terry is the Executive Director of Project Life and the National Director of Operation Rescue, is a resident of Windsor, New York, and has sojourned in the City of Atlanta, Georgia, from time to time to pursue the purposes of Operation Rescue.

4.

Defendant Gary Leber is a co-sponsor of Operation Rescue, and has sojourned in the City of Atlanta, Fulton County, Georgia, from time to time to pursue the purposes of Operation Rescue.

5.

Defendant Michael McMonagle is an officer of the Pro Life Non-Violent Action Project of Philadelphia and is a co-sponsor of Operation Rescue. He is a resident of Philadelphia, Pennsylvania, and has sojourned in the City of Atlanta, Georgia from time to time to pursue the purposes of Operation Rescue.

6.

Defendant Joseph Foreman is an officer of the Council for the Sanctity of Human Life and a co-sponsor of Operation Rescue. He is a resident of Atlanta, Georgia, and has sojourned in the City of Atlanta, Georgia from time to time to pursue the purpose of Operation Rescue.

7.

Mitchell Williams, while not a normal defendant, voluntarily participated in the trial of this case; he is a resident of Atlanta, Georgia.

8.

Defendant Michael Hirsh is a director of Operation Rescue, Atlanta, which maintains offices on Windy Hill Road in Marietta, Georgia. Hirsh has sojourned in the City of Atlanta, Georgia from time to time to pursue the purpose of Operation Rescue.

9.

Each of the Defendants have in the past, and plan in the future, to continue to obstruct and attempt to close down facilities at which abortions are performed in the City of Atlanta, Georgia, by intentionally trespassing upon, sitting-in, blocking, impeding or obstructing ingress into or egress from such facilities, intimidating and harassing patients and visitors, staging disruptive protests, and otherwise disrupting and interfering with the operations of such facilities.

10.

The Defendants do not accept the decisions of the United States Supreme Court that the United States Constitution guarantees and protects a woman's right to choose abortion and to carry out that decision, and Defendants intend to interfere with those rights of women attending the targeted clinics and providers.

11.

Defendants upon arrest have refused to reveal their true names to police, and have refused to voluntarily accompany police officers when they are arrested, all in an effort to slow the process. Defendants' instructions to their co-conspirators acknowledge that they are likely

to be arrested and state that even if the police make arrests and seek to "disperse the crowd" the goal of the Defendants "is to keep the doorway occupied". Defendants exhort others to "put their bodies on the line before abortion mills".

12.

Beginning on July 19, 1988, the Defendants began a series of activities which they called "rescues", all under the name of a group which they had formed entitled "Operation Rescue". These activities have continued to the present time.

13.

The way that Operation Rescue conducts a "rescue" is as follows: Members of Operation Rescue gather in large numbers, without notice to the City of Atlanta police or to the health care provider, at entrances to medical clinics, hospitals, and other health care facilities which perform abortions. These large groups gather in tightly formed layers of lines of people, sitting or standing, interlocking arms together with one another, in order to use their bodies to physically block access to or from the targeted clinic, hospital, or health care facility.

14.

The Court received abundant evidence that in addition to the "rescues" described herein, the Defendants and many other acting in concert with the Defendants, have engaged in demonstrations, picketing, and protests which exceed the lawful bounds of activity protected by the First Amendment to the United States Constitution, with the intent and effect of interferring with the operation of lawful businesses in the City of Atlanta, and have obstructed and interfered with many women's exercise of their constitutionally protected freedoms as well as other citizens rights of access to medical facilities, through the following types of conduct.

a) physically blocking entry ways; impeding ingress and egress; congregating and swarming around persons attempting to leave or enter abortion facilities; trespassing upon private property; and physically blocking and impeding streets and sidewalks, creating a gauntlet for persons trying to enter abortion facilities.

b) creating noise which has interfered with the safe provision of medical services within abortion facilities.

c) violating the privacy rights of patients, their families and friends, employees, medical practitioners and other invitees of abortion facilities by videotaping and photographing said individuals and by recording motor vehicle license plate numbers.

d) yelling, shouting, screaming and using abusive, inciting and sometimes profane epithets directed at patients, their families and friends, employees, medical practitioner and other invitees of abortion facilities.

e) assaulting, tortiously harassing and following sometimes for great distances patients, their families and friends, employees, medical practitioners and other invitees of abortion facilities within the City.

f) congregating and swarming around motor vehicles being used by patients, their families and friends, employees, medical practitioners and other invitees of abortion facilities within the City.

15.

Operation Rescue and Defendants' actions have had the effect of denying or disrupting women's access to the targeted clinics, with the intended result that many woman have delayed and will delay their scheduled services. Any delay in the provision of health services related to child birth and abortions significantly increases the health risks faced by the women affected.

16.

The Defendants have intentionally concealed their intended target for a "rescue operation" so as to frustrate police in trying to contend with the situation and so as to slow down the law enforcement process, thus taking as much of the police officers' time as possible.

17.

In an effort to slow down the arrest process, members of Operation Rescue refuse to voluntarily accompany Atlanta police when they are placed under arrest. Instead, when arrested, they go limp, refuse to stand up or walk, and thus force police officers to carry or drag them, or use force in order to transport them to police vehicles.

18.

The City of Atlanta's Pretrial Detention Center is the holding and processing facility for most persons who are arrested for violating City ordinances and state laws within the City of Atlanta corporate limits. The Pretrial Detention Center currently has the capacity to house 523 prisoners.

19.

During the period of time from July 19, 1988 to date, there have been approximately 1,320 arrests made of members of "Operation Rescue" at various abortion clinics throughout the City of Atlanta, all of whom were processed through the City of Atlanta's Pretrial Detention facility.

20.

The processing of a prisoner is an administratively detailed process which takes approximately one hour at the time of intake and another hour at the time of release.

21.

Members of the group, "Operation Rescue" including the named Defendants have commonly given City of At-

lanta police officers aliases or identify themselves as "Baby John Doe" or "Baby Jane Doe" and when this is done the recordkeeping hours are essentially doubled because the records have to be changed when the real names of the prisoners are discovered or given to police or prison officials.

22.

Because many of those arrested for criminal trespass in Operation Rescue refused to divulge their identity and for other reasons, the average length of stay for each of the persons arrested who are associated with Operation Rescue has been 5.21 days. Many of the members of Operation Rescue stayed in jail for periods of time in excess of 30 days, for the reasons stated above.

23.

The average direct cost for the City's 1989 budget year to house a prisoner at the City of Atlanta's Pretrial Detention facility was $41.00 per prisoner per day. Using this figure of cost per prisoner per day, the calculated cost to the City of Atlanta, to house the total number of people who have been arrested and are associated with Operation Rescue since July 1988 to date is $272,076.00. This number does not include the many indirect costs incurred by the City associated with arresting and processing "Operation Rescue" members, which include overtime pay for the police and corrections officers and other costs.

24.

In addition, many of the City's corrections officers and police officers have been forced to work overtime because of the Operation Rescue activities and the overtime and extra hours worked by individual officers during said occasions has created an extremely stressful environment in the City's public safety rank and file personnel and caused a physical and mental strain on individual officers. Moreover, such officers have been taken away from, and unable to perform other City duties while responding to

the unlawful activities of Defendants and others acting in concert with Defendants.

CONCLUSIONS OF LAW

1.

Defendants are subject to the jurisdiction and venue of this Court.

2.

The City of Atlanta has standing to bring this action and to assert the claims for relief herein.

3.

The City of Atlanta has obtained proper service on all Defendants.

4.

All Defendants have received legal notice of this trial in conformity with the requirements of due process and state and other applicable law.

5.

Defendants Operation Rescue, Randall Terry, Gary Leber, Michael McMonagle and Joseph Foreman having failed to appear for trial, their respective Answers and Counterclaims are struck, and any motions filed are deemed abandoned.

6.

Defendant Michael Hirsh was present for and participated in the trial. Mitchell Williams, while not a named Defendant claiming to be Defendant John Doe was present and was permitted to participate in said trial. All motions of said individuals to the extent they have not been abandoned at trial, are denied.

7.

In September, 1988, the City Council of Atlanta adopted and the Mayor approved a resolution declaring the activities of these Defendants and others acting in concert with them, to be a public nuisance, and directing the City attorney to file this action.

8.

The City of Atlanta is authorized to abate nuisances pursuant to Appendix I(31) of its Charter.

9.

Defendants' actions individually and jointly have endangered the health and safety of the City of Atlanta and its citizens, thereby constituting a nuisance.

10.

The City of Atlanta has a substantial interest in persons receiving unimpeded access to and from privately owned businesses and medical facilities.

11.

There is a real threat of irreparable injury to patients of medical facilities where Defendants conduct their activities.

12.

There is no adequate remedy at law available to the City of Atlanta and to its citizens on whose behalf the City has brought this lawsuit.

13.

There is no public policy against granting injunctive relief under these circumstances.

14.

The City of Atlanta's resources to assert, process and detain have been diverted and depleted by Defendants' activities and have been ineffective to control and curtail the illegal conduct of the Defendants.

15.

"Rescue" style demonstration activities of Defendants have gone beyond the legitimate free speech and freedom of assembly rights under the First Amendment to the Constitution.

16.

The Court concludes neither trespassing nor tortious harassment are constitutionally protected activities; nor are Defendant's activities in impeding ingress and egress, interfering with the conduct of lawful businesses and similar related illegal activities.

17.

Freedom of speech and expression includes the right to attempt to persuade. It does not include the right to coerce, harass or intimidate. One does not become more persuasive by raising the volume of one's voice.

This 27th day of March, 1990.

/s/ Isaac Jenrette
HONORABLE ISAAC JENRETTE
Judge, Fulton Superior Court
Atlanta Judicial Circuit

APPENDIX C

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

Civil Action File No. D-61462

CITY OF ATLANTA, GEORGIA,
Plaintiff,

vs.

OPERATION RESCUE; RANDALL TERRY, GARY LEBER, MICHAEL MCMONAGLE, JOSEPH FOREMAN, MICHAEL HIRSH, JOHN DOE(s) and JANE DOE(s), the last two being fictitious names the real names of said Defendants being presently unknown to Plaintiff, said fictitious names being intended to designate organizations or persons who are members of Operation Rescue and others acting in concert with any of the Defendants who are engaging in or intend to engage in the conduct complained of herein,
Defendants.

ORDER

[Filed Mar. 28, 1990]

Based upon the findings of fact and conclusions of law entered herein on file in this office of the clerk of this Court and incorporated herein by reference.

IT IS HERBY ORDERED: (a) That Defendants' Counterclaims are hereby dismissed for want of prosecution; and (b) that Defendants herein and any and all persons acting in concert or participation with them, including but not limited to agents, directors, or repre-

sentatives of Defendants, be and they hereby are restrained and enjoined from particular conduct as follows:

1.

No persons other than patients, their families and friends, employees, medical personnel or invitees of any facility at which abortions are performed within the City of Atlanta shall enter said facilities or private parking lots used by patients, medical personnel, employees and invitees of said facilities.

2.

No person shall inhibit or impede or attempt to inhibit or impede in any way the free and unmolested ingress and egress of patients, their families and friends, other recipients of the service, medical personnel, employees, and other invitees of any facility at which abortions are performed within the City of Atlanta, or to any parking lot used by said persons walking or moving to or from said facilities.

3.

No person shall conduct demonstrations pickets or protests within 50 feet of any property line of any facility within the City of Atlanta at which abortions are performed.

4.

No person shall physically abuse, assault, or tortiously harass persons entering or leaving, working at or using services at any facility at which abortions are performed in the City of Atlanta, Ga. or intentionally make any excessively loud noise or sound which disturbs, injures, or endangers the health and safety of any patient, employee, medical practitioner or invitee of any such facility, so as to complicate the medical services being provided.

5.

No first person seeking to pass a leaflet or handbill to or display a sign to or engage in oral protest, education, or counseling with a second person, in the public way or sidewalk area within a radius of fifty feet from any property line of any facility at which abortions are performed in the City of Atlanta or within a radius of fifty feet of any parking lot used by patients, employees, medical practitioners and invitees of such facilities, shall approach closer than five feet from such second person, unless such second person gives express oral consent to do so. Immediately upon request of such second person, no such first person shall fail to withdraw to at least five feet from such second person, or, in the alternative, to discontinue all efforts at passing such leaflet or handbill or displaying such sign or engaging in such protest, education or counseling. Without limitation, such imperative statements as "stop", "withdraw", "back off", "get away", "leave me alone" shall be sufficient to constitute such request. This prohibition shall also apply whenever any such second person is moving to such parking lots from such facilities, or to such facilities from such parking lots.

6.

No person engaging in activities enjoined by this order shall refuse to reveal their truthful names to a City of Atlanta police officer or refuse to voluntarily accompany a City of Atlanta police officer to or from a police vehicle when arrested.

7.

Demonstrating, Picketing and Protesting shall be permitted within 50 feet of the property line of any facility at which abortions are performed in the City of Atlanta only as follows: the number of participants shall not exceed 20 per abortion facility; the participants shall remain far enough apart from each other and from any other person so as not to block or impede ingress or egress

to such facility, parking lot or driveway used by patients, their families and friends, employees, medical practitioners or invitees of said facilities, or to violate any of the provisions of this order. Further that no sign may be used to block or impede ingress or egress to such facility parking lot or driveway and no sign shall induce a passer-by to honk or blow their horn.

8.

No person shall solicit, induce or direct any other person to violate the provisions of this Order.

9.

Nothing in this Court Order shall be construed to limit Defendants' exercise of their First Amendment Rights, except as to the time, place and manner limitations set forth herein.

10.

That Defendant Operation Rescue and its officers agents and representatives and the individual named defendants and those working in concert with them are directed and ordered to instruct all members of any such organization and all those working with them not to engage in or participate in any of the activities enjoined in this order.

11.

IT IS FURTHER ORDERED that any Defendant or any other person subject to this Order who fails to comply with this Order may be subject to a civil contempt penalty of $500.00 for each individual, separate violation of this Order; and

12.

IS IS FURTHER ORDERED that Plaintiff shall not be required to post any security; and

13.

IT IS FURTHER ORDERED that any sworn police officer of the City of Atlanta is authorized to serve a copy of this Order upon any Defendant in this case, named or unnamed, or any other person subject to this order.

IT IS SO ORDERED, this 27th day of Mar., 1990.

/s/ Isaac Jenrette
HONORABLE ISAAC JENRETTE
Judge, Fulton Superior Court
Atlanta Judicial Circuit

APPENDIX D

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

Civil Action File No. D-61462

CITY OF ATLANTA, GEORGIA,
Plaintiff,

vs.

OPERATION RESCUE; RANDALL TERRY, GARY LEBER, MICHAEL MCMONAGLE, JOSEPH FOREMAN, MICHAEL HIRSH, JOHN DOE(S) and JANE DOE(S), the last two being fictitious names the real names of said Defendants being presently unknown to Plaintiff, said fictitious names being intended to designate organizations or persons who are members of Operation Rescue and others acting in concert with any of the Defendants who are engaging in or intend to engage in the conduct complained of herein,
Defendants.

AMENDED ORDER

[Filed Mar. 29, 1990]

Based upon the findings of fact and conclusions of law entered herein on file in this office of the clerk of this Court and incorporated herein by reference.

IT IS HEREBY ORDERED: (a) That Defendants' Counterclaims are hereby dismissed for want of prosecution; and (b) that Defendants herein and any and all persons acting in concert or participation with them, including but not limited to agents, directors, or representatives of Defendants, be and they hereby are restrained and enjoined from particular conduct as follows:

1.

No persons other than patients, their families and friends, employees, medical personnel or invitees of any facility at which abortions are performed within the City of Atlanta shall enter said facilities or private parking lots used by patients, medical personnel, employees and invitees of said facilities.

2.

No person shall inhibit or impede or attempt to inhibit or impede in any way the free and unmolested ingress and egress of patients, their families and friends, other recipients of the service, medical personnel, employees, and other invitees of any facility at which abortions are performed within the City of Atlanta, or to any parking lot used by said persons walking or moving to or from said facilities.

3.

No person shall conduct demonstrations pickets or protests within 50 feet of any property line of any facility within the City of Atlanta at which abortions are performed.

4.

No person shall physically abuse, assault, or tortiously harass persons entering or leaving, working at or using services at any facility at which abortions are performed in the City of Atlanta, Ga. or intentionally make any excessively loud noise or sound which disturbs, injures, or endangers the health and safety of any patient, employee, medical practitioner or invitee of any such facility, so as to complicate the medical services being provided.

5.

No first person seeking to pass a leaflet or handbill to or display a sign to or engage in oral protest, education, or counseling with a second person, in the public

way or sidewalk area within a radius of fifty feet from any property line of any facility at which abortions are performed in the City of Atlanta or within a radius of fifty feet of any parking lot used by patients, employees, medical practitioners and invitees of such facilities, shall approach closer than five feet from such second person, unless such second person gives express oral consent to do so. Immediately upon request of such second person, no such first person shall fail to withdraw to at least five feet from such second person, or, in the alternative, to discontinue all efforts at passing such leaflet or handbill or displaying such sign or engaging in such protest, education or counseling. Without limitation, such imperative statements as "stop", "withdraw", "back off", "get away", "leave me alone" shall be sufficient to constitute such a request. This prohibition shall also apply whenever any such second person is moving to such parking lots from such facilities, or to such facilities from such parking lots.

6.

No person engaging in activities enjoined by this order shall refuse to reveal their truthful names to a City of Atlanta police officer or refuse to voluntarily accompany a City of Atlanta police officer to or from a police vehicle when arrested.

7.

Unless otherwise prohibited by this order, Demonstrating, Picketing and Protesting shall be permitted in the vicinity of any facility at which abortions are performed in the City of Atlanta only as follows: the number of participants shall not exceed 20 per abortion facility; the participants shall remain far enough apart from each other and from any other person so as not to block or impede ingress or egress to such facility, parking lot or driveway used by patients, their families and friends, employees, medical practitioners or invitees of said facilities, or to violate any of the provisions of this order.

Further that no sign may be used to block or impede ingress or egress to such facility parking lot or driveway and no sign shall induce a passer-by to honk or blow their horn.

8.

No person shall solicit, induce or direct any other person to violate the provisions of this Order.

9.

Nothing in this Court Order shall be construed to limit Defendants' exercise of their First Amendment Rights, except as to the time, place and manner limitations set forth herein.

10.

That Defendant Operation Rescue and its officers agents and representatives and the individual named defendants and those working in concert with them are directed and ordered to instruct all members of any such organization and all those working with them not to engage in or participate in any of the activities enjoined in this order.

11.

IT IS FURTHER ORDERED that any Defendant or any other person subject to this Order who fails to comply with this Order may be subject to a civil contempt penalty of $500.00 for each individual, separate violation of this Order; and

12.

IT IS FURTHER ORDERED that Plaintiff shall not be required to post any security; and

13.

IT IS FURTHER ORDERED that any sworn police officer of the City of Atlanta is authorized to serve a

copy of this Order upon any Defendant in this case, named or unnamed, or any other person subject to this order.

IT IS SO ORDERED, this 28th day of Mar., 1990.

/s/ Isaac Jenrette
HONORABLE ISAAC JENRETTE
Judge, Fulton Superior Court
Atlanta Judicial Circuit

APPENDIX E

SUPREME COURT OF GEORGIA
ATLANTA April 25, 1990

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

S90M0936

MICHAEL HIRSH

v.

CITY OF ATLANTA, GEORGIA, *et al.*

Upon consideration of the Motion for Supersedeas filed in this matter, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Joline B. Williams
Clerk

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. A-752

MICHAEL HIRSH, *et al.*

v.

CITY OF ATLANTA, GEORGIA

ON APPLICATION FOR STAY

[May 14, 1990]

The application for stay presented to JUSTICE KENNEDY and by him referred to the Court is denied.

JUSTICE STEVENS, concurring.

It would be irresponsible to attempt to distinguish *National Socialist Party of America* v. *Skokie*, 432 U.S. 43 (1977), on the basis of any difference in the content of the speech involved in that case and the content of the speech involved in this. It is entirely proper, however, to draw a distinction between injunctive relief imposing time, place, and manner restrictions upon a class of persons who have persistently and repeatedly engaged in unlawful conduct, on the one hand, cf. *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 697-698 (1978); *United States* v. *Paradise*, 480 U.S. 149, 193 (1987) (STEVENS, J., concurring in judgment) and

an injunction that constitutes a naked prior restraint against a proposed march by a group that did not have a similar history of illegal conduct in the jurisdiction where the march was scheduled. Cf. *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419-420 (1971); *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 162-163 (1969) (Harlan, J., concurring). I would not extend the holding in the *Skokie* case to this quite different situation. For that reason, I think the Court correctly exercises its discretion to deny the application for extraordinary relief in this case.

JUSTICE KENNEDY, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE SCALIA join, dissenting.

A Georgia trial court issued an injunction prohibiting at least one of the applicants from engaging in certain means of public protest. The Supreme Court of Georgia refused to stay the injunction pending appeal. *National Socialist Party of America* v. *Skokie*, 432 U.S. 43 (1977), does not distinguish among speakers based on the content of their speech. Its terms, in my view, require us to treat the stay application as a petition for certiorari, to grant certiorari, and to reverse the denial of a stay by the Supreme Court of Georgia. See *id.*, at 44. I dissent from the denial of the stay.

(2)

Supreme Court, U.S.
FILED
JUL 12 1991
OFFICE OF THE CLERK

No. 90-1893

In The

Supreme Court of the United States

October Term, 1991

MICHAEL HIRSH,

Petitioner,

v.

CITY OF ATLANTA,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Georgia

RESPONDENT'S BRIEF IN OPPOSITION

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INTRODUCTION

Petitioner previously brought the subject action before this Court in a Motion for Stay, pending a decision by the Georgia Supreme Court, which was subsequently denied by this Court. *Hirsh v. City of Atlanta*, ___ U.S. ___, 110 S.Ct. 2163, 109 L.Ed.2d 493 (1990). Since the denial of the stay by United States Supreme Court, the Georgia Supreme Court has upheld the subject injunction with one modification, so that its effect is to significantly narrow the application of the injunction as originally granted by the Superior Court. While the original injunction created a fifty foot free zone adjacent to medical clinics performing abortions within the City of Atlanta, the injunction as interpreted by the Georgia Supreme Court now permits protest activities within fifty feet of abortion clinics, but keeps in effect the other time, place and manner restrictions which were part of the injunction as originally granted by the Superior Court. In particular, the injunction prohibits Defendants from trespassing onto abortion clinic property, impeding ingress and egress into a clinic, or physically harassing or assaulting persons entering clinics. Additionally, the injunction as upheld by the Georgia Supreme Court allows First Amendment activities within fifty feet of clinics with a limit of twenty protesters at a time, and permits a person to engage in sidewalk counselling or oral protest with a second person within fifty feet of a clinic or parking lot used by the clinic as long as such person does not approach closer than five feet to the second person without first receiving that person's permission. Additionally, the injunction prohibits signs which would induce honking by passersby of clinics, and requires the named Defendants and

those acting in concert with them to inform others working with them of the subject injunction and that they are not permitted to engage in activities enjoined by the order. (J.A. 24a through 28a). No restrictions are imposed beyond the above referenced 50 foot boundaries.

Respondent shows that the subject injunction is consistent with the U.S. Constitution and that there is no basis for this Court to grant Certiorari.

STATEMENT OF THE CASE

The City of Atlanta filed a complaint in the Fulton County Superior Court, seeking an injunction, pursuant to a resolution of the Atlanta City Council adopted on September 19, 1988 and approved by the Mayor on September 27, 1988. (T. 321).[1] Said resolution was adopted by the City Council as a result of a pattern of disruptive and unlawful activities conducted by a group of individuals and organizations seeking to prevent abortions and known collectively as "Operation Rescue". The activities of Operation Rescue included physically blocking patients' and staff members' access to abortion clinics and family planning facilities operating within the City of Atlanta, harassing the patients and staff members, trespassing upon clinic property and otherwise engaging in activities not protected by the First Amendment to the United States Constitution. The resolution declared the

[1] The abbreviation "T" used throughout this brief refers to the transcript of the trial in the Superior Court on March 22, 1990.

actions undertaken by Operation Rescue to constitute a public nuisance endangering the health, safety and welfare of the City of Atlanta and its citizens. (T. 322-324).

The disruptive activities of Operation Rescue, and other Defendants, including petitioner, commenced in the City of Atlanta in July, 1988, around the time of the Democratic National Convention. (T. 37, 104). From that time until the date the Amended Order was entered, (J. A. 29a),[2] Operation Rescue almost continuously blocked entrances to abortion clinics, trespassed into and upon said facilities, and engaged in other disruptive activities at clinics located within the City of Atlanta. (T. 37, 38, 127). Operation Rescue's method of disruptive behavior is as follows:

> Upon arrival they would solidify a group of people that they had come in groups of, sometimes as little as thirty, other times as many as two hundred. They would target a specific clinic in particular, or on some occasions, more than one clinic. They would arrive at that location, immediately go straight to the property, go straight to the doors, accesses, attempt by sitting down, laying down, locking of arms to block all entrances and exists to and from the clinic where they were present at. (T. 38, Testimony of Lieutenant Carl Pyrdum).

In addition, Operation Rescue's activities included yelling abusive language at clinic patients and employees, swarming persons in cars entering clinics, creating noise levels so loud as to disturb patients inside

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[2] The abbreviation "J. A." used throughout this brief refers to the joint appendix attached to brief of Petitioner.

the clinics including those involved in medical procedures at the time. (T. 38, 116, 117). As a result of Operation Rescue's and the other Defendants' tactics, abortion facilities have been forced to provide escorts to assist patients and their families in gaining access to the facilities. The escorts also had to shield the patients from the surrounding protesters by the use of umbrellas. (T. 114). The tactics of Operation Rescue and the other Defendants have caused patients to reschedule appointments, patients have been prevented from entering into the building for medical procedures, and at other times have been trapped inside the clinic. Defendants further caused physicians to be locked out of the clinics, and emergency entrances to be blocked. Overall these actions resulted in great distress for patients, family, and staff members. The Defendants' actions have also resulted in placing patients at a greater health risk, such as causing patients' pulse rates and blood pressure to rise before medical procedures, and caused the delay of medical procedures. (T. 111-112, 115-117). Evidence at trial also showed that the activities of Operation Rescue and other Defendants have cost the City of Atlanta a substantial amount of money including overtime pay for police, correction and court personnel as well as substantial costs for housing the Defendants when arrested following their criminal activities and other administrative costs. (T. 93-95). The minimum cost to the City of Atlanta associated with housing the Defendants and others associated with Operation Rescue constituting 1274 arrests was estimated to be approximately $272,076.00. Because many protesters refused to give correct names during the booking process the average stay of each protester in jail

increased to 5.21 days which added to the City's costs. (T. 93-94).

Petitioner Michael Hirsh has been a director of Operation Rescue and has regularly participated in disruptive activities at abortion clinics within the City of Atlanta since the Democratic Convention. (T. 47, 122, 124, 127, 143, 144).

Additionally, facts supporting the imposition of the subject injunction are amply set out by the Georgia Supreme Court in its decision. (J.A. 2a to 5a). After a bench trial, the trial court issued its Findings of Fact and Conclusions of Law on March 28, 1990, and the Court's Amended Order, issued the next day set in place the injunction subsequently modified by the Georgia Supreme Court from which the Petitioner now appeals. The Georgia Supreme Court upheld the injunction, with a modification, in a decision rendered on March 15, 1990.[3]

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[3] This brief will address the arguments raised by Petitioner Hirsh. Paragraph three of the injunction by its terms imposed a prohibition on all "demonstrations, pickets or protests" within fifty feet of the property line of any abortion business. (J. A. 30a). The Supreme Court of Georgia, however, construed the injunction to allow up to twenty demonstrators, picketers, or protestors within fifty feet of the property line of any abortion business. (J. A. 6a-7a). The court essentially subordinated the provisions of paragraph three to the less restrictive provisions of paragraph seven of the injunction. *Id.* ("In order to meet the requirement that the restrictions be narrowly tailored, the ban in paragraph 3. . . . must be read in conjunction with paragraph seven. . . . "). In effect, the court deleted paragraph three entirely, and modified paragraph seven by replacing the phrase "in the vicinity" with "within 50 feet of any property line".

Petitioner previously filed an application for stay of the subject injunction to the U.S. Supreme Court, which was subsequently denied by this Court. *Hirsh v. City of Atlanta*, ___ U.S. ___, 110 S.Ct. 2163, 109 L.Ed.2d 493 (1990). (J.A. 35a).

ARGUMENT AND CITATION OF AUTHORITY

I. THE DECISION OF THE SUPREME COURT OF GEORGIA IS CONSISTENT WITH DECISIONS OF OTHER STATE COURTS

Petitioner has asserted that there is division among the states as to whether "otherwise lawful expressive activities in public places" may be enjoined. While Petitioner seeks to assert a distinct difference exists among the state courts, none of the state court decisions cited by petitioner have rejected the time, place, and manner analysis established by this Court, and the state court cases cited by Petitioner have consistently upheld injunctions, in some instances modified in part, applying to protesters' activities at or near medical facilities in which abortions are performed.

Petitioner has cited *Planned Parenthood League of Massachusetts, Inc. v. Operation Rescue*, 406 Mass. 701, 550 N.E. 2d 1361 (1990), a case in which the Massachusetts Supreme Court upheld a preliminary injunction which prohibited among other things the trespassing, blocking, or obstructing access to persons using the clinics of Plaintiff. Note 5, 406 Mass at 705, 550 N.E.2d at 1364. While the preliminary injunction in that case did not create a zone

restricting protestors activities as does the subject injunction, the Court was not asserting that such a zone could not pass constitutional muster. The Court was merely asserting that the injunction being considered before it merely enjoined Plaintiffs from engaging in illegal activities. The Court further noted that the injunction did not prohibit expressive activity "which does not unduly interfere with the rights of others". 406 Mass. at 715, 550 N.E. 2d at 1370. On the contrary, the Court asserted that the injunction before it did not constitute a prior restraint and that governments may impose reasonable time, place, and manner restrictions regulating conduct which justifies incidental limitations on First Amendment rights, and referenced *Texas v. Johnson*, 109 S. Ct. 2533, 2540 (1989) in support of said proposition.

Petitioner also has cited *O.B.G.Y.N. v. Birthright of Brooklyn and Queens, Inc.*, 64 A.D. 2d 894, 407 N.Y.S.2d 903 (1978) in support of the proposition that there is a dichotomy among the states as to whether "otherwise lawful" expressive activity in public places may be limited, and references a quote in said case that restraints should be limited only to activities that are not protected under the First and Fourteenth Amendments to the United States Constitution. However, Petitioner omitted the next sentence of *O.B.G.Y.N. Associates*, 407 N.Y.S.2d at 905, which states:

> While the cases have declared that Defendants' expressive activities i.e., picketing and pamphleteering, are protected under the First and Fourteenth Amendments, the "cases make equally clear, however, that reasonable 'time, place and manner' regulations may be necessary to further significant governmental interests,

> and are permitted." (Citing *Grayned v. City of Rockford*, 408 U.S. 104, 115, 92 S. Ct. 2294, 2303, 33 L. Ed 2d 222).

Additionally, contrary to Petitioner's implication, the injunction in *O.B.G.Y.N. Associates* contained restrictions on arguably "otherwise lawful" expressive activities which were upheld by the Court including a free zone which prohibited Defendants from parking their vehicles within 100 yards of the subject medical clinics even though the vehicles had been used to post placards. Additionally, the injunction upheld in that case prohibited "excessively loud noise which disturbs, injures or endangers the health and safety of patients" of the medical clinic. Presumably noise that "disturbs" patients may not otherwise be illegal activity in New York State, but the court found said prohibition to be constitutionaliy valid, in that that type activity was found to be incompatible with the normal activity of a particular place at a particular time and once again referenced *Grayned, supra,* for its holding. 407 N.Y.S.2d at 905, 906.

Also cited by Petitioner is a subsequent New York State case of *Parkmed Co. v. Pro-Life Counselling, Inc.*, 91 A.D. 2d 551, 457 N.Y.S.2d 27 (1982). While the Court in *Parkmed* modified an injunction in part by deleting a provision which it deemed overbroad which prohibited "demonstrating, picketing, and any way interfering with activities on the plaza area or steps". The Court held that a sufficiently clear standard was needed so as to put parties on notice as to what constituted lawful versus restrained conduct. However the *Parkmed* court once again affirmed the ability of governments to establish

reasonable time, place and manner restrictions on activities subject to the First Amendment. 457 N.Y.S.2d at 29, 91 A.D. 2d at 552. The Georgia Supreme Court decision in the subject case is consistent with the holding in *Parkmed* in that the Georgia Supreme Court has upheld an injunction with clear guidelines as to the specific activities which are enjoined, yet preserving ample alternative means of communications.

Additionally, petitioner has cited several cases which petitioner has conceded have upheld specific restrictions on the number and location of protesters outside of medical facilities where abortions are performed. Several of the cases cited by Petitioner have upheld restrictions which are arguably more stringent than those upheld by the Georgia Supreme Court in the subject action. In particular, in *Bering v. SHARE*, 106 Wash. 2d 212, 721 P. 2d 918 (1986), *cert. dismissed*, 479 U.S. 1050, 107 S. Ct. 940, 93 L.Ed. 990 (1987), the Supreme Court of Washington upheld an injunction imposing time, place and manner restrictions which among other things confined picketing, demonstrating, or "counseling" to a public sidewalk area on one side of the medical facilities' main entrance.

And in *Planned Parenthood Association of Cincinnati v. Project Jerico*, 52 Ohio St. 3d 56, 556 N.E. 2d 157, *reh'g denied*, 53 Ohio St. 3d 706, 558 N.E. 2d 61 (1990), the Court upheld an injunction limiting the total number of stationary picketers to two persons and to three moving picketers in an area outside the medical clinic. The subject injunction as modified by the Georgia Supreme Court is arguably much less restrictive than injunctions upheld in *Planned Parenthood Association of Cincinnati* and *Bering*. The subject injunction allows up to 20 demonstrators

within a 50 foot area and imposes no restrictions beyond the 50 foot area, allowing for ample alternative means of communication; it must be considered a reasonable content neutral time, place and manner restriction consistent with court decisions of other states.

II. THE DECISION IS CONSISTENT WITH THE DECISION OF THIS COURT AND THE FEDERAL COURTS OF APPEALS

A. AN INJUNCTION MAY PROPERLY CONTAIN A TIME, PLACE AND MANNER ANALYSIS

Petitioner Hirsh has attempted to assert that only "unlawful" activities may be restricted by courts when providing injunctive relief to a party which has been repeatedly subjected to a pattern of disruptive, harassing, and at times unlawful acts by third parties. Said assertion ignores a whole line of cases upholding content neutral, reasonable time, place, and manner restrictions on otherwise "lawful" first amendment activities.

Reasonable time, place and manner restrictions almost identical to those in the subject petition have been upheld by other courts across the nation. See, *N.Y. State National Organization for Women v. Terry*, 886 F.2d 1339 (2nd Cir. 1989), *cert. denied*, ___ U.S. ___ 110 S. Ct. 2206, 109 L.Ed.2d 532 (1990); *Portland Feminist Women's Health Center v. Advocates for Life*, 859 F. 2d 681 (9th Cir. 1988). While the U.S. Supreme Court has consistently recognized that the First Amendment reflects "a profound national commitment" to the principle that "debate on public issues should be uninhibited, robust and wide open", *Boos v. Barry*, 485 U.S. 312, 108 S. Ct. 1157, 1162, 99

L.Ed. 2d 333 (1988), it is also recognized that "the First Amendment may not be read to protect a person's right to express their (sic) views at any time, in any manner, and in any place of their choosing". *Terry*, 886 F.2d at 1363. (See also, *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 647, 102 S. Ct. 2559, 2563-64, 69 L.Ed. 2d 298 (1981)). The *Terry* case is important not only for its holding allowing an injunction under the First Amendment, but because its facts are similar to those in the instant case, and because some of the same Defendants were involved in both that case and this one. In *Terry*, contrary to the contention at page 11 of Petitioner's brief, the Court not only regulated "unlawful activities" of Defendant Operation Rescue and others, such as trespassing and blocking ingress and egress into the medical clinics, but also imposed restrictions on arguably otherwise "lawful" activities such as "obstructing" ingress and egress, and restricted "sidewalk counselling" to not more than two people. 886 F.2d at 1363.

As noted by the U.S. Court of Appeals for the Second Circuit in the *Terry* case:

> Operation Rescue's activities are subject to reasonable time, place and manner restrictions so long as the limitations are (1) content-neutral, (2) narrowly tailored to meet a significant governmental interest, and (3) leave open ample alternative means of communication." 886 F.2d at 1363 (2nd Cir. 1989). See also, *Clark v. Community for Creative Non-violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 3068-69 (1984).

Where, as here, a regulation is content neutral, the reasonableness of the regulation depends upon "the nature of a place and the pattern of its normal activities",

Grayned v. City of Rockford, 408 U.S. 104, 92 S. Ct. 2294, 33 L.Ed.2d 222 (1972).

In citing *Grayned*, the U.S. Court of Appeals for the Ninth Circuit concluded:

> We have no doubt that the interests that render reasonable the regulation of disruptive expression outside schools and courthouses also operate to allow regulation of disruptive expression outside a clinic where medical services including surgery are offered. *Portland Feminist Women's Health Center v. Advocates for Life*, 859 F.2d 681, 686 (9th Cir. 1988).

The U.S. Court of Appeals for the 2nd Circuit in *Terry* further stated:

> As we view it the order regulates the time, place and manner of expression in a way that neutrally balances the rights of Operation Rescue to express its views, of women to enter the clinics unhindered by an invasion of their rights, and of the clinics to provide necessary medical services. *Terry*, 886 F.2d at 1363 (2nd Cir. 1989).

Petitioner has cited several U.S. Court of Appeals decisions which Petitioner asserts are contrary to the decision of the Supreme Court of Georgia in the subject action. However, in actuality, the cases cited by Petitioner do not support granting of certiorari in the subject action. In particular, Petitioner has cited *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788 (5th Cir. 1989), in which the Fifth Circuit upheld the denial of a preliminary injunction sought against anti-abortion protestors by a medical clinic. In *McMillan*, the Plaintiff clinic had sought a five hundred foot "free zone" in which protest activities would be prohibited, including a prohibition on the use

of certain words by protestors such as "kill", "murder", and "butcher". The injunction sought in *McMillan* is distinguishable from the subject action in that the subject action contains a much more narrowly tailored injunction, with no "free zone" in which Defendants' activities are prohibited. The instant injunction *permits* Defendants to be located within a 50 feet zone based on compliance with other provisions of the injunction. Furthermore the injunction sought in *McMillan* was arguably content based in that it would have prohibited use of certain words. The subject injunction does not restrict the language which may be used by Petitioner or other Defendants and is content neutral, and unlike *McMillan*, the trial court in the subject action has found that sufficient evidence existed to warrant granting an injunction.

In *National Organization for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990) (per curiam), *cert. granted on other grounds sub nom., Bray v. Alexandria Women's Health Clinic*, ___ U.S. ___, 111 S.Ct. 1070, 112 L.Ed.2d 1176 (1991) cited by Petitioner, the Fourth Circuit Court of Appeals upheld the injunction granted by the trial court at 724 F.Supp. 1483 restricting protest activities adjacent to abortion clinics, but deferred to the trial court in declining to expand the injunction as sought in a cross appeal by Appellees to include a prohibition on activities which would "intimidate, harass or disturb patients". There is no indication that the Plaintiffs in that case sought at trial to obtain the type of time, place, and manner relief obtained in the subject action which includes a specified 50 foot zone in which activities of named Defendants and those acting in concert with them are limited, and other similar relief. Furthermore, the

appellate court in *National Organization* stated it would defer to the trial court, absent a finding of an abuse of discretion. The holding in *National Organization* does not evidence a division among the various U.S. Court of Appeals circuits which Petitioner attempts to assert exists.

The type relief provided in the subject injunction is consistent with time, place and manner restrictions that have been upheld by the U.S. Supreme Court and other federal appellate court decisions. In *Boos v. Barry*, 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988), the U.S. Supreme Court upheld a statute limiting the congregating of three or more persons within 50 feet of embassies when deemed to be a threat to the security or peace of an embassy. 108 S.Ct. at 1168. The subject injunction is much more narrowly tailored in that it extends only 50 feet rather than the 500 feet restriction upheld in *Boos*. More importantly, the subject injunction allows for twenty demonstrators within 50 feet of a medical facility, as opposed to *Boos* where the Court upheld a restriction of congregations of three or more persons. In addition, the subject injunction as imposed is in response to a history of noisy, abusive, and disruptive tactics by Petitioner, Operation Rescue and others acting in concert with them and other Defendants, and is a narrowly tailored response to said Defendants' past history and ongoing actions.

And in *Concerned Jewish Youth v. McGuire*, 621 F.2d 471 (2nd Cir. 1980), *cert. den.* 450 U.S. 913, 101 S.Ct. 1352 (1981), the U.S. Court of Appeals held that a restriction to twelve demonstrators to be confined to a bull pen within sight of the intended audience, the Soviet Mission, was constitutionally valid. The Court upheld this limit due in

part to the special nature of the building in question and referenced other locations where zones limiting free speech have been upheld as reasonable time, place, or manner restrictions, including jails, schools, and courthouses. Similarly, medical facilities where surgical procedures are performed are entitled to protection from excessive disturbance; thus restrictions on the number of protesters in the vicinity of such facilities is constitutionally valid.

Petitioner has cited *White House Vigil v. Clark*, 746 F.2d 1518 (D.C. Cir. 1984) in support of the proposition that courts lack expertise to draft time, place, and manner restrictions. However, in *Clark* the Court of Appeals reversed a District Court ruling that modified most of the regulations established by the U.S. Park Service regarding demonstrations outside the White House. The Court of Appeals held that the U.S. Park Service regulations were reasonable time, place, and manner restrictions and that the trial court's role was either "to uphold regulations which are constitutional and to strike down those which are not". 746 F.2d at 1529. The Court of Appeals was merely stating what the court's role was in evaluating a regulation; the Court of Appeals, contrary to Petitioner's implication, was not stating that injunctive relief was unavailable in fashioning a time, place, and manner remedy for harmed parties. The D. C. Court of Appeals in *Clark*, by upholding such time, place, and manner restrictions as restricting the size and material of signs, requiring all signs to be attended, and restricting the placement of signs, provides legal precedent for upholding the subject time, place, and manner restrictions.

Petitioner cites *Grayned, supra,* and other cases for the proposition that a time, place, and manner analysis is limited only to statutes, ordinances, and regulations; this argument however, is completely without merit. While *Grayned* and other cases cited by Petitioner involved ordinances or regulations, they do not support Petitioner's conclusion that a time, place, and manner analysis is inapplicable to injunctions. In fact, in *Portland Feminist Women's Health Center,* 859 F.2d at 686 (9th Cir. 1988), the appellate court held that the time, place, and manner analysis of *Grayned* is applicable to appellate review of an injunction limiting protest activities adjacent to abortion clinics and other medical facilities. That Court held:

> The reasonableness of a time, place and manner restriction depends heavily upon "[t]he nature of a place, 'the pattern of its normal activities . . . . ' The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned,* 408 U.S. at 116, 92 S.Ct. at 2303. The Supreme Court has applied this principle to sustain regulation of disruptive speech in front of schools, *Grayned,* 408 at 121, 92 S. Ct. at 2306, and near a courthouse, *Cox v. Louisiana,* 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965). We have no doubt that the interests that render reasonable the regulation of disruptive expression outside schools and courthouses also operate to allow regulation of disruptive expression outside a clinic where medical services including surgery are offered. 859 F.2d at 686.

Thus a time, place, and manner analysis can and should be made in regard to the subject injunction.

Petitioner places great reliance upon a footnote in *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 924, 102 S.Ct. 3409, 3431, 73 L.Ed.2d 1215, n. 67 (1982) for the proposition that only unlawful activities, not "protected speech" may be enjoined. However, *NAACP* concerned a Mississippi State Court decision totally enjoining a black led boycott of white businesses, unlike the present injunction merely imposing reasonable time, place, and manner restrictions as to the manner in which arguably first amendment protected activities may occur. Clearly, the Court in *NAACP* was not rejecting a time, place, and manner analysis in regard to injunctions. Justice Stevens (author of the opinion in *NAACP*) recognized this in his concurrence denying Petitioner's application for a stay in the subject action, distinguishing the subject injunction from the injunction ultimately struck down by the Court in *National Socialist Party of America v. Skokie*, 432 U.S. 43, 97 S.Ct. 2205, 53 L.Ed. 96 (1977). Justice Stevens wrote in this very case that "(i)t is entirely proper, however, to draw a distinction between injunctive relief imposing time, place, and manner restrictions upon a class of persons who have persistently and repeatedly engaged in unlawful conduct, on the one hand, . . . , and an injunction that constitutes a naked prior restraint against a proposed march by a group that did not have a similar history of illegal conduct in the jurisdiction where the march was scheduled". *Hirsh v. City of Atlanta*, ___ U.S. ___, 110 S.Ct. 2163, 109 L.Ed.2d 493 (1990). (cites omitted).

Therefore, even though the unlawful conduct of Petitioner may be restrained, other activities subject to the First Amendment are nevertheless subject to reasonable

time, place or manner restrictions, and Petitioner's Petition for Writ of Certiorari should accordingly be denied.

B. THE INJUNCTION IS CONTENT NEUTRAL

It has been consistently held that an injunction in order to pass constitutional muster must be content neutral. The primary concern of content neutrality is that no speech or expression of a "particular content" is "singled out" by the government for better or worse treatment. *Terry*, 886 F.2d at 1363, citing *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 98 L.Ed.2d 346 (1976). Petitioner Hirsh has asserted that the subject injunction regulates speech based on content. However, the challenged portions of the subject injunction makes no reference whatsoever to the content of any speech, nor does it exempt picketing or demonstrating for reasons other than opposing abortion. But the injunction does prohibit certain activities, regardless of content, in areas adjacent to abortion facilities.

Furthermore, the injunction (J. A. 29a) is entirely consistent with Rule 65(d) of the Georgia Civil Practice Act, O.C.G.A. § 9-11-65(d), which requires that an injunction "shall be specific in terms; . . . . shall describe in reasonable detail. . . . the act or acts sought to be restrained. . . . and is binding only upon the parties to the action, their officers, agents, servants, employees and attorneys and upon those persons in active concert or participation with them. . . . ". Said rule is substantially

identical to Rule 65(d) of the Federal Rules of Civil Procedures. The subject injunction is focused, as the injunction in the Portland case was, "exclusively on the location and manner of expression", see *Portland Feminist Women's Health Center*, 859 F.2d at 686 (9th Cir. 1988). It is applicable uniformly irrespective of the subject matter which is desired to be communicated.

While Petitioner asserts that the subject injunction only applies to "anti-abortion" speech, this assertion is without foundation. On the contrary, the challenged portions of the injunction makes no reference whatsoever to speech content but merely constitutes time, place, and manner regulations regarding Defendants' activities and those acting in concert with them. Thus Petitioner has completely misread the meaning and the intent of the plain language of the injunction.

C. THE "BUBBLE ZONE" PROVISION IS NOT UNCONSTITUTIONAL

Petitioner Hirsh at pages 24 through 28 of his brief again misreads the terms of the injunction. The injunction creates a five-foot "bubble" of personal space applicable within fifty feet of medical clinic property lines or within a radius of fifty feet of parking lots used by clinic staff and patients in which one person may not intentionally invade without the express permission, the five-foot "bubble" of another person.

The purpose of this provision is to allow free access to and from the clinics covered by the injunction, while accommodating the Petitioners' First Amendment rights.

Again the context in which this injunction was entered must be remembered. The evidence in this case shows that the Petitioner and others, often in crowds of hundreds of people, gathered at entrances to clinics. When a patient arrived, all of these persons immediately turned and focused all of their attention on the patient, her family and friends, swarming around the car in which the patient was riding, screaming and yelling abusive epithets, banging on the car, and pressing up against the car doors and windows. When the patients and their families attempted to simply walk into the clinic entrances, they were swarmed about, bumped, pushed, shoved and jostled as they attempted to make their way. Moreover, their ways have been physically blocked by huge crowds of people, pushing up against them and yelling in close proximity to their faces while screaming things like "don't kill your baby" and similar outbursts intended to frighten and turn away patients, their families and friends. (T. 115-116).

The purpose of the bubble zone is to provide free unfettered ingress and egress to and from the clinics which is a constitutionally protected right in itself.

The language in this portion of the injunction is also clear and unmistakable in its terms. It is constitutionally content neutral as required by case law. A cursory reading of the injunction reveals that it does *not* "single out for discriminatory treatment only those who try to deliver a pro-life message to potential patrons of abortion facilities." (R. 248).

"Bubble zone" provisions in the vicinity of medical facilities, such as in this case, have been upheld by

various courts. In a scholarly discourse on this subject, a recent law review article argues that "bubble protection like that provided by Boulder's Bubble Zone Ordinance is an appropriate and permissible means of balancing the rights of speakers against the privacy interests of certain unwilling listeners." Note, "Too Close For Comfort: Protesting Outside Medical Facilities", 101 *Harvard Law Review* 1856 *et seq.*

As noted by the law review article, "when speakers' interests conflict with those of unwilling listeners, the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate". *Rowan v. United States Post Office*, 397 U.S. 728, 736, 90 S.Ct. 1484, 1490, 25 L.Ed.2d 736 (1970). Justice Brandeis once described "the right to be let alone" as "the most comprehensive of rights and most valued by civilized men". *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928). (Brandeis, dissenting). Although courts generally strike this balance in favor of speakers, see *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210-211, 95 S.Ct. 2268, 2273, 45 L.Ed.2d 125 (1975), they are quite willing to protect listeners when "substantial privacy interests are invaded in an essentially intolerable manner". *Cohen v. California*, 403 U.S. 15, 21, 91 S.Ct. 1780, 1786, 29 L.Ed.2d 284 (1971). As noted by the law review author, "in recent years listeners' privacy interests have come into sharp conflict with the speakers' interests outside abortion clinics", where "protesters have chased patients outside abortion clinics, waved dismembered dolls splattered with red paint, screamed epithets and threats at both patients and staff, sometimes forcing proximity on listeners to enhance the dramatic impact of their

speech" in extremely aggressive ways. 101 *Harvard Law Review* at 1856.

The courts have permitted states to protect listeners who can not easily escape bombardment by unwanted speech. See *Lehman v. City of Shake Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1973) (protecting listeners inside public buses from political advertising); *Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949) (protecting listeners in and outside their homes from loud and raucous noise); *International Society for Krishna Consciousness, Inc. v. Rockford*, 585 F.2d 263 (7th Cir. 1978) (protecting passengers in line at Airport ticket counters from religious solicitation).

As the Georgia Supreme Court noted in the subject case, *Hirsh, supra*, "the 5-foot 'bubble zone' is an appropriate and permissible means for the trial court to use in balancing the protestors' freedom of expression with the patients' rights of access to chosen medical care and to privacy." (J.A. 8A). As the Court noted, the "bubble zone" "affords a clinic patient, physician, or employee the ability to exit a vehicle and approach the site of medical care without being swarmed, jostled, and yelled at from close range by the protesters." (J.A. 7A). Accordingly the subject "bubble zone" is a reasonable time, place or manner restriction and does not provide a basis for petitioner to be granted certiorari by the U.S. Supreme Court in the subject action.

D. THE PROVISIONS OF THE INJUNCTION ARE NOT UNCONSTITUTIONALLY VAGUE AND OVERBROAD

In response to Petitioners' assertion at pages 27 and 28 of his brief it must be remembered that we are dealing

here with an injunction and not a statute or ordinance. Therefore only the courts may interpret its meaning and enforce its provisions. In the Portland case, the enjoined defendants challenged the injunction for overbroadness and vagueness, however the Court of Appeals held that:

> The vagueness doctrine is based on due process principles that require fair notice and warning. (Cites omitted). It also incorporates a requirement that specificity be sufficient to avoid arbitrary and discriminatory enforcement. (Citations omitted). The doctrine's goal is to avoid allowing policemen, prosecutors and juries to pursue their personal predilections by requiring legislators to promulgate specific standards in criminal statutes. (Citations omitted). These concerns arise in a different context here where enforcement lies entirely in judicial hands. So viewed the injunction is not unconstitutionally vague for reasons that we have already set forth. *Portland Feminist Women's Health Center,* 859 F.2d at 687 (9th Cir. 1988).

It has also been held that Rule 65(d) of the Federal Rules of Civil Procedure, (which is substantially identical to O.C.G.A. § 9-11-65) requires that injunctive orders be "specific in terms" and "describe in reasonable detail the act or acts sought to be restrained." The rule is intended to prevent an uncertain or vague decree from becoming the basis for a contempt citation. See, *Schmidt v. Lessard,* 414 U.S. 473, 476, 94 S.Ct. 713, 715, 38 L.Ed.2d 661 (1974).

"Injuctions are not set aside under Rule 65(d) . . . unless they are so vague that they have no reasonably specific meaning". *United States v. Holtzman,* 762 F.2d 720, 726 (9th Cir. 1985).

To comply with the specificity and clarity requirements, an injunction must "be specific and definite enough to apprise those within its scope of the conduct that is being proscribed." *In re Baldwin – United Corp.*, 770 F.2d 328, 339 (2nd Cir. 1985).

Injunctions similar to the one in the instant case were upheld in both the *Terry* and *Portland* cases, in the face of challenges based on vagueness and overbreadth. *New York State NOW v. Terry*, 886 F.2d 1339 (2nd Cir. 1989) *cert. denied*, ___ U.S. ___, 110 S.Ct. 2206, 109 L.Ed.2d 532 (1990); *Portland Feminist Women Health Center*, 859 F.2d 681 (9th Cir. 1988).

Here, as in those cases, the conduct that lay between that which was prohibited and that which was permitted was sufficiently clear for defendants to ascertain precisely what they could and could not do. *Terry*, 886 F.2d at 1352.

E. THE INJUNCTION PROPERLY REQUIRES PERSONS SUBJECT TO IT TO INSTRUCT OTHERS TO COMPLY THEREWITH

Paragraph 10 of the injunction simply requires the Petitioner and others subject to the injunction to instruct others to comply with the order, and is clearly not unconstitutional. (J.A. 32a). Although Petitioner Hirsh speculates on theoretical applications which might be used regarding this provision, it must again be remembered that the enforcement of this order "rests entirely in judicial hands" and only the judiciary can interpret its meaning and apply its provisions. In *Portland Feminist Women's*

Health Center, supra, at 687, the enjoined parties complained that the terms of the injunction were unconstitutionally vague and subject to interpretation by the plaintiffs, but the Court of Appeals disagreed, noting that only the court could interpret its order and enforce it.

Likewise, the order is not unconstitutional because it demands compliance with its terms and demands that Petitioner and others subject to it to instruct their co-defendants to comply with its terms. The order can not be read to require anyone to speak against his conscience or to ask anyone to support abortions, the U.S. Supreme Court, or a right of privacy of others. The order forbids certain conduct but leaves all of the defendants, including Petitioner, free to communicate ideas and disseminate their views ad nauseam on these publicly debated topics. All that is required is that the Petitioner and others subject to the injunction instruct their co-defendants of a lawful court order and that they are bound to obey it. Thus, this case is readily distinguishable from those in which a citizen was required, for example, to salute a flag in contravention of his religious beliefs, or to affix an auto tag to his vehicle reading "live free or die".

Paragraph 10 is a legitimate enforcement tool and was properly included in the injunction.

CONCLUSION

For the foregoing reasons, Petitioner is not entitled to a grant of certiorari of the judgment of the Supreme Court of Georgia in the case at bar.

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No. 90-1893

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

MICHAEL HIRSH,
Petitioner,

v.

CITY OF ATLANTA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Georgia

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does an injunction that forbids the distribution of literature on public ways and sidewalks, absent the prior, express oral consent of each recipient, violate the right to free speech under the First and Fourteenth Amendments?

2. Does an injunction that forbids conversation with, or the display of a sign to, any other person, within five feet of that person, absent the prior, express oral consent of that other person, violate the right to free speech under the First and Fourteenth Amendments?

3. Does an injunction that compels objectionable speech by requiring a person affirmatively to "instruct" others "not to engage in or participate in any of the activities enjoined" violate the right to free speech under the First and Fourteenth Amendments?

4. Is an injunction that forbids otherwise lawful expressive activity in public places an unconstitutional prior restraint?

5. Does an injunction that forbids otherwise lawful expressive activity and applies only to opponents of abortion violate the rights to free speech and equal protection of the laws under the First and Fourteenth Amendments?

6. Are the terms of the challenged injunction unconstitutionally vague or overbroad?

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INTRODUCTION

The decision below sustained an injunction that created new and substantial restrictions on free speech in public places. The respondent City of Atlanta has attempted to minimize the clear conflict among the state and federal courts regarding the constitutionality of such an injunction, and has attempted to explain away the serious incompatibility of this ruling with the precedents of this Court. The city fails, however, in this effort.

The gravity and obviousness of the threat to free speech which the injunction at issue poses prompted four members of this Court last year to vote to stay the injunction pending petitioner Hirsh's appeal to the Supreme Court of Georgia. *See Hirsh v. City of Atlanta*, 110 S. Ct. 2163 (1990) (App. 35a) (denying application for stay by 5-4 vote, over the dissent of Justices Kennedy, Brennan, Marshall, and Scalia). This Court should now grant plenary review to address on the merits the important constitutional questions presented.

ARGUMENT

The central question presented in this case is the constitutionality under the first amendment of an injunction that restrains otherwise lawful free speech. Petitioner Michael Hirsh is an active opponent of human abortion; within the boundaries of the respondent City of Atlanta are at least five abortion facilities. These facilities have been the focus of various anti-abortion activities—everything from peaceful picketing and literature distribution to physical blockades.

Under the first amendment, an injunctive remedy must distinguish between lawful free speech, on the one hand, and such generally unlawful activities as trespass or obstruction, on the other hand. To restrain the former in

response to the latter—as was done here—is an unconstitutional overreaction.[1]

I. THE INJUNCTION IMPOSES SUBSTANTIAL AND IMPERMISSIBLE RESTRICTIONS ON FREE SPEECH.

The City of Atlanta tries to minimize the seriousness of the restrictions on free speech in the case at bar. The challenged portions of the injunction, however, plainly have a substantial and detrimental impact on free expression.

Paragraph Five of the injunction creates a "speech-free bubble zone" around anyone who uses public ways or sidewalks within 50 feet of the property line of any abortion facility (or parking lot used by staff or patrons) in the City of Atlanta. Amended Order ¶ 5 (App. 30a-31a). No one may display a sign, offer a leaflet, or even speak to another person, with a five-foot imaginary "bubble" surrounding that person, without first obtaining the "express oral consent" of that person. This unprecedented prior "audience consent" requirement effectively bans the distribution of literature.

> As residents of metropolitan areas know from daily experience, confrontation by a person asking for [something] disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information. One need not ponder the contents of a leaflet or pamphlet in order mechanically to take it out of someone's hand, but one must listen, comprehend, decide and act in order to respond to a solicitation.

United States v. Kokinda, 110 S. Ct. 3115, 3123 (1990) (plurality). Instead of allowing for a quiet "encounter with a person giving out information," *id.*, the "bubble

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[1] The city provides an extended discussion of anti-abortion blockades, *see* Brief in Opp. at 2-5; those portions of the injunction that prohibit trespass, obstruction, tortious harassment, and excessive noise, however, are not at issue in the present petition.

zone" provision forces opponents of abortion to *solicit* "express oral consent" to deliver their message—or else cease efforts to communicate.[2] For these same reasons, the "bubble zone" provision effectively bans even mere conversation within the "bubble of silence" surrounding passersby. Picketers, meanwhile, in order to comply with the "bubble zone," must conceal the messages on their placards whenever passing within five feet of another person.

Paragraphs Five and Seven of the injunction impose restrictions that apply only to anti-abortion speech. The city's claim that the injunction would apply to "picketing or demonstrating for reasons other than opposing abortion," Brief in Opp. at 18, flies in the face of reason and the text of the injunction itself. (The order applies by its terms only to "persons acting in concert or participation with" the anti-abortion defendants. App. 29a). It is simply unthinkable that the city would cite for contempt an opponent of apartheid who was silently leafletting within fifty feet of a parking lot used by abortion patrons. Yet a pro-lifer would face contempt charges for identical activity. If an animal rights marcher totes a sign reading, "Honk if you love baby seals," the injunction does not apply. But if an opponent of abortion standing at the same location displays the message, "Honk if you love babies," that is contempt of court. This is "censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments." *Carey v. Brown*, 447

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[2] Contrary to the claim of the city, the "bubble zone" provision is not a mere safeguard of personal space. The provision does not forbid approaching within five feet of another person *simpliciter*; instead, the ban only applies to someone seeking to communicate. The "bubble zone" provision allows an opponent of abortion the "alternative" of standing within five feet of any other person, even if the other person tells him to "get away," so long as the opponent of abortion agrees "to discontinue all efforts at passing [a] leaflet or handbill or displaying [a] sign or engaging in . . . protest, education or counseling." App. 31a. The "bubble zone" bans speech, not physical proximity.

U.S. 455, 463 n.7 (1980) (citations and quotation marks omitted).

Paragraph Ten of the injunction compels Hirsh to "instruct" others "not to engage in or participate in any of the activities enjoined in this order." Amended Order ¶ 10 (App. 32a). The injunction already forbids Hirsh to "solicit, induce or direct any other person to violate the provisions of this order." *Id.* ¶ 8 (App. 32a). Paragraph Ten goes much farther, not simply requiring Hirsh to refrain from inciting others to act, but affirmatively requiring him to "instruct" others *not* to act. This compulsory speech is deeply offensive to Hirsh, who believes that people have a moral obligation to oppose human abortion, especially by lawful means such as leafletting, Tr. 140. Conscripting Hirsh's tongue against his will is fundamentally inconsistent with free speech. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

The city's attempt to portray the injunction as creating no more than minor limitations on free speech, then, greatly misconceives the severity of this injunction.[3]

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER STATE COURTS AND FEDERAL COURTS OF APPEALS.

In its brief, the city emphasizes the agreement among the state and federal courts that an injunction may issue to forbid trespass, obstruction of access, and similar anti-

[3] Hirsh and the city are in agreement that the Supreme Court of Georgia eliminated one additional restriction on speech—a fifty-foot ban on demonstrations, pickets, and protests—originally imposed by the trial court. Pet. at 7 n.4; Brief in Opp. at 5 n.3. But while the injunction as modified permits up to twenty opponents of abortion within fifty feet of each abortion facility, the "bubble zone" provision still effectively negates any opportunity to leaflet or engage in sidewalk counseling. The value of mere presence is largely defeated by the severe burden on speech imposed under the remaining portions of the injunction.

abortion "rescue" activities. But the propriety of injunctions against trespass is not the issue here. Petitioner Hirsh challenges only the restrictions the present injunction imposes on traditional free speech activities—picketing, leafletting, and pure verbal speech. On the specific question whether an injunction may restrain otherwise lawful free speech and assembly in public places, the state and federal courts are deeply divided. Pet. § I.

The Fifth Circuit, for example, in *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788 (5th Cir. 1989), refused to approve an injunction banning anti-abortion activities within 500 feet of an abortion facility. The court held, not that the injunction was merely too broad, as the city suggests, Brief in Opp. at 13, but that the first amendment permitted the court no *authority*, in the absence of some state law regulating the activities in question, to "cut off the peaceful communication of information," 866 F.2d at 796 (lead opinion of Gee, J.). The "bubble zone" ban on leafletting at issue here, by contrast, directly cuts off peaceful communication.

The highest court of Massachusetts likewise declared peaceful speech on public sidewalks to be protected under the first amendment, *Planned Parenthood League of Massachusetts, Inc. v. Operation Rescue*, 406 Mass. 701, 713-15, 550 N.E.2d 1361, 1369-70 (1990), and held that an injunction "must differentiate between legal and illegal expressive activity," *id.* at 713, 550 N.E.2d at 1369. The court below, by contrast, sustained injunctive restrictions not only against trespass, but also against peaceful speech on public sidewalks.

The appellate courts of New York have twice eliminated portions of injunctions that restricted the free speech of abortion opponents in public places. *See O.B.G.Y.N. Ass'n v. Birthright of Brooklyn and Queens, Inc.*, 64 A.D.2d 894, 407 N.Y.S.2d 903 (1978) (peaceful picketing, conversation, literature distribution, messages on placards); *Parkmed Co. v. Pro-Life Counselling, Inc.*, 91 A.D.2d 551, 457 N.Y.S.2d 27 (1982) (peaceful demonstrations,

handing out pamphlets, carrying placards, quiet verbal efforts to persuade). The court below, by contrast, sustained injunctive restrictions on peaceful picketing, literature distribution, and mere quiet conversation.

The Fourth Circuit went so far as to affirm the denial of an injunction against "activities that tend to 'intimidate, harass, or disturb patients or potential patients'" because of concern for the mere "risk" of deterring protected speech. *National Organization for Women v. Operation Rescue*, 914 F.2d 582, 586 (4th Cir. 1990) (per curiam), *cert. granted on other grounds sub nom. Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991). The court below, by contrast, upheld far more substantial, direct restrictions on expressive activity in public places.

The city repeatedly misrepresents the relevant decision in the Second Circuit, *New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990), as upholding an injunction "almost identical" to the one at issue here. Brief in Opp. at 10, 11, 24. The truth is quite the contrary. The injunction in *New York State NOW* contained *no* "bubble zone," *no* limitation on the number of demonstrators on public ways outside abortion businesses, *no* ban on certain messages on signs, and *no* compulsory speech requirement. In short, the injunction the Second Circuit upheld contained *none* of the provisions at issue here. Indeed, it was precisely the *absence* of any restrictions on lawful speech in public places that the Second Circuit relied upon in sustaining the injunction. Pet. at 11.

The city correctly points out that the case of *White House Vigil v. Clark*, 746 F.2d 1518 (D.C. Cir. 1984), involved regulations, not an injunction. Brief in Opp. at 15. Petitioner Hirsh already noted this fact, Pet. at 11 n.7, and carefully pointed out that the *ratio decidendi* of *White House Vigil*—that courts have no authority to modify an existing regulatory scheme governing the time,

place, and manner of speech in public places—is completely incompatible with the decision below, which endorses "judicial rulemaking" by means of injunction. Pet. at 10-11.

The conflict among the state and federal courts, over the constitutionality of injunctions against otherwise lawful free speech, is plain. This Court should grant review to resolve that conflict.

III. THE DECISION BELOW CONFLICTS WITH NUMEROUS DECISIONS OF THIS COURT.

The decision below, sustaining serious injunctive restrictions on otherwise lawful free speech, conflicts in numerous ways with the precedents of this Court. Pet. § II. This is not surprising: *no* decision of this Court has ever endorsed the use of a prior injunctive restraint against *lawful* free speech. Nor has the city succeeded in reconciling the decision below with the decisions of this Court.

A. In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), this Court held that judicial remedies *must* distinguish between unlawful activity and lawful free speech. The injunction at issue here violates the teaching of *Claiborne Hardware* because it disregards the protected status of peaceful speech in public places. Pet. § II(A).

Claiborne Hardware held that the assessment of damages for particular torts provides no basis for imposing damage liability for free speech activities; logically, then, the grant of a remedial injunction against particular torts likewise could not justify enjoining otherwise protected speech. *See* 458 U.S. at 924 n.67 ("*For the same reasons*," the permanent injunction "must be dissolved"; the injunction "must be modified to restrain *only unlawful conduct* and the persons responsible for *conduct of that character*") (emphases added). The city's attempt derisively to confine the rule of *Claiborne Hardware* to a single footnote in the Court's opinion, Brief in Opp. at

17, is seriously mistaken. That footnote simply applied the rule of decision to injunctions. The consignment of this matter to a footnote only highlights the uncontroversial nature of this logical corollary to the Court's holding.

B. The decision below also ignores the prior restraint doctrine, and instead reviews injunctive restrictions on speech under the deferential time, place, and manner analysis reserved for legislation. Pet. § II(B).

The city has discovered only one solitary decision—a federal appeals court ruling—applying time, place, and manner analysis to an injunction against free speech in public places. The Ninth Circuit, in rendering this unique opinion, cited no authority for treating an injunction like a statute or ordinance. *See Portland Feminist Women's Health Center v. Advocates for Life*, 859 F.2d 681, 686 (9th Cir. 1988). The rule in this Court, contrary to the Ninth Circuit's isolated holding, is that injunctive restrictions on speech in public places are scrutinized under the demanding standard for prior restraints. *E.g., National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977) (per curiam) (injunction against marches and rallies); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (injunction against distribution of literature); *Carroll v. President of Princess Anne*, 393 U.S. 175 (1968) (court order restraining public rallies and meetings). The decision in *Portland Feminist* is merely a lonesome aberration.

The city cites another federal appellate decision, *New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990), as supposed authority for applying time, place, and manner analysis to injunctions against lawful speech in public places. But the injunction at issue in *New York State NOW* forbade only trespass and physical blockades, not classic, lawful free speech activities such as picketing and leafletting on public sidewalks. *See* 886 F.2d at 1354 n.1 (text of injunction). Indeed, the Second Circuit explicitly affirmed the

right of anti-abortion activists to "express their views . . . when standing on a public sidewalk," *id.* at 1363.[4]

C. The decision below also runs afoul of this Court's jurisprudence by sustaining restrictions on lawful speech in public places which apply only to anti-abortion speech. Pet. § II(C). The city has not attempted to justify such discrimination, but instead simply denies that the injunction applies only to pro-lifers. As discussed above, the city's interpretation of the injunction—as if it were an ordinance applicable to everyone—is nonsensical and itself unconstitutional. *See also* Pet. at 23 n.13.

D. The challenged terms of the injunction conflict, in any event, with the precedents of this Court upholding free speech rights in public fora. Pet. § II(D).

The city cites no case upholding a "prior consent" requirement for speech on public sidewalks. Indeed, the notion that one would first have to seek explicit verbal leave of a passerby, before offering a leaflet, is virtually unthinkable.

The city's solitary authority for its "bubble zone" is a law review note. Brief in Opp. at 21. But even this article supports Hirsh, not the city.[5] To impose a prior con-

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[4] The city claims that the injunction at issue in *New York NOW* restricted sidewalk counseling to not more than two people. Brief in Opp. at 11. This is inaccurate. The injunction contained a "safe harbor" *proviso* conferring an affirmative exemption—not a ceiling—for sidewalk counseling by "not more than two people *with each person they are seeking to counsel*," i.e., two counselors *per passerby*. *See* 886 F.2d at 1345 n.1 (emphasis added). To construe his "safe harbor" clause as a limit on free speech would be to turn this provision on its head. *See also id.* ("nothing in this order shall be construed to limit Operation Rescue participants' exercise of their legitimate First Amendment rights").

[5] The article "concedes that bubble zone protection burdens expressive activity that merits first amendment protection," Note, *Too Close for Comfort: Protesting Outside Medical Facilities*, 101 Harv. L. Rev. 1856, 1859 (1988), and specifically criticizes the implementation of bubble zones by means of injunction, observing that "these injunctions probably would constitute 'prior restraint,' " *id.* at 1873. Moreover, the Note concludes that even a bubble zone *ordinance*—

sent requirement "which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantees [of free speech and freedom of the press]." *Schneider v. State*, 308 U.S. 147, 164 (1939).

E. The compulsory speech portion of the injunction (Paragraph Ten) forces petitioner Hirsh to violate his conscience by telling others to obey the injunction. The precedents of this Court clearly forbid such compulsory speech. Pet. § II(E). The city cites no authority to the contrary, but instead baldly denies the violation of conscience (as if the city were the judge of Hirsh's conscience). Brief in Opp. at 25. The city notes that Hirsh is free to *add* as much speech as he wants, as if this could "cure" the offensiveness of the compelled speech. *Id.* Needless to say, this reasoning would require the overruling of all prior decisions of this Court holding compulsory speech unconstitutional.

CONCLUSION

This Court should grant the petition for certiorari in the case at bar.

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as opposed to an injunction—could be constitutional only "if amended to provide bubble protection only when protection is affirmatively invoked," *id.* at 1875. The bubble zone provision in the present injunction, by contrast, applies presumptively, i.e., until the listener gives "express oral consent." *See* Amended Order ¶ 5 (App. 31a).